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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 44

PROPERTY

VOLUME 31

Chap.

VOLUME 32

Law reviews. — For article, "The Right to Include," see 63 Emory L.J. 857 (2014).

CHAPTER 1

GENERAL PROVISIONS

44-1-2. "Realty" or "real estate" defined; extent of owner's interest in airspace.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
FIXTURES

General Consideration

Cited in S-D RIRA, LLC v. Outback Prop. Owners' Ass'n, 330 Ga. App. 442, 765 S.E.2d 498 (2014).

Fixtures

Speaker system installed in nightclub was fixture. — Building tenant, a nightclub, was not entitled to the proceeds of an insurance policy that was plainly and unambiguously payable to the mortgage holder of the building after it was damaged by fire. In the absence of evidence that a speaker system destroyed by the fire was not a fixture, the tenant was not entitled to reimbursement for its loss. Club Libra, Inc. v. R. L. King Props., LLC, 324 Ga. App. 547, 751 S.E.2d 418 (2013).

House passed with land in foreclosure action. — House's owner who moved the house onto a lot owned by another failed to state a claim against a lender for wrongful foreclosure of the owner's house along with the lot because, under Georgia law, real estate included all lands and the buildings thereon, O.C.G.A. § 44-1-2(a)(1), so the house passed with the land. Jurden v. HSBC Mortg. Corp., 330 Ga. App. 179, 765 S.E.2d 440 (2014).

44-1-6. What things considered fixtures; movable machinery as personalty; effect of detachment from realty.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
INTENTION OF PARTIES

General Consideration

Cited in LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, No. 1:12-CV-2545-AT, 2013 U.S. Dist. LEXIS 187236 (N.D. Ga. Feb. 13, 2013).

Intention of Parties

Doubt as to whether affixed personalty to be transferred.

Bankruptcy court could not determine on summary judgment whether bowling

alley lanes and pin setters which a bank sold when the bank foreclosed on a security agreement the bank held on a bowling alley and sold the bowling alley were fixtures under O.C.G.A. § 44-1-6 because the parties executed two documents which contained evidence of a conflicting intent, and the court ordered the parties to present evidence on that issue at trial. Although the court granted the bank relief from the stay that was imposed when a corporation declared Chapter 7 bankruptcy and allowed the bank to sell the bowling alley at a private sale, the bank's description of the property prior to sale was sufficient to convey title only to real property that was part of the bowling alley, and the Chapter 7 trustee was seeking an order requiring the bank to turn over proceeds it derived from selling the debtor's personal property, pursuant to 11 U.S.C. § 542. Lubin v. Ga. Commerce Bank (In re Southern Bowling, Inc.), No. 09-06045, 2010 Bankr. LEXIS 4007 (Bankr. N.D. Ga. Oct. 8, 2010).

44-1-7. Possession of personalty.

JUDICIAL DECISIONS

Cited in Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

44-1-13. Removal of improperly parked cars or trespassing personal property; concurrent jurisdiction; procedure; automatic surveillance prohibited; penalty.

(a) As used in this Code section, the term:

(1) "Department" means the Department of Public Safety.

(2) "Private property" means any parcel or space of private real property.

(a.1) Any person or his or her authorized agent entitled to the possession of any private property shall have the right to remove or cause to be removed from the property any vehicle or trespassing personal property thereon which is not authorized to be at the place where it is found and to store or cause to be stored such vehicle or trespassing personal property, provided that there shall have been conspicuously posted on the private property notice that any vehicle or trespassing personal property which is not authorized to be at the place where it is found may be removed at the expense of the owner of the vehicle or trespassing personal property. Such notice shall also include information as to the location where the vehicle or personal property can be recovered, the cost of said recovery, and information as to the form of payment; provided, however, that the owner of residential private property containing not more than four residential units shall not be required to comply with the posting requirements of this subsection. Only towing and storage firms issued permits or licenses by the local governing authority of the jurisdiction in which they operate or by the department, and having a secure impoundment facility, shall be permitted to remove trespassing property and trespassing personal

property at the request of the owner or authorized agent of the private property.

(b)(1) The department shall have the authorization to regulate and control the towing of trespassing vehicles on private property if such towing is performed without the prior consent or authorization of the owner or operator of the vehicle, including the authority to set just and reasonable rates, fares, and charges for services related to the removal, storage, and required notification to owners of such towed vehicles. No storage fees shall be charged for the first 24 hour period which begins at the time the vehicle is removed from the property, and no such fees shall be allowed for the removal and storage of vehicles removed by towing and storage firms found to be in violation of this Code section. The department is authorized to impose a civil penalty for any violation of this Code section in an amount not to exceed $2,500.00.

(2) In accordance with subsection (d) of this Code section, the governing authority of a municipality may require towing and storage operators to charge lower maximum rates on traffic moving between points within such municipality than those provided by the department's maximum rate tariff and may require higher public liability insurance limits and cargo insurance limits than those required by the department. The governing authority of a municipality shall not provide for higher maximum costs of removal, relocation, or storage than is provided for by the department.

(c) In all municipalities, except a consolidated city-county government, having a population of 100,000 or more according to the United States decennial census of 1970 or any future such census a person entitled to the possession of an off-street parking area or vacant lot within an area zoned commercial by the municipality shall have the right to remove any vehicle or trespassing personal property parked thereon after the regular activity on such property is concluded for the day only if access to such property from the public way is blocked by a sturdy chain, cable, or rope stretched at least 18 inches above grade across all driveways or other ways providing access to the off-street parking area or vacant lot and there is conspicuously posted in the area a notice, the location of which must be approved by the municipality's police department, that any vehicle or trespassing personal property parked thereon which is not authorized to be in such area may be removed at the expense of the owner along with information as to where the vehicle or trespassing personal property may be recovered, the cost of said recovery, and information regarding the form of payment.

(d)(1) In addition to the regulatory jurisdiction of the department, the governing authority of each municipality having towing and storage firms operating within its territorial boundaries may require

and issue a license or permit to engage in private trespass towing within its corporate municipal limits pursuant to this Code section to any firm meeting the qualifications imposed by said governing authority. The fee for the license or permit shall be set by such governing authority. The maximum reasonable costs of removal, relocation, and storage pursuant to the provisions of this Code section shall be compensatory, as such term is used in the public utility rate-making procedures, and shall be established annually by the governing authority of each municipality having towing and storage firms operating within its territorial boundaries; provided, however, that no storage fees shall be charged for the first 24 hour period which begins at the time the vehicle is removed from the property, and no such fees shall be allowed for the removal and storage of vehicles removed by towing and storage firms found to be in violation of this Code section.

(2) Towing and storage firms operating within a municipality's corporate limits shall obtain a nonconsensual towing permit from the department and shall file its registered agent's name and address with the department. The department may assess and collect an application fee in an amount to be determined by the commissioner and such amount shall not exceed the total direct and indirect costs of administering the program or activity with which the fee is associated. Pursuant to Code Section 45-12-92.1, the fees collected shall be retained by the department and expended solely for the purpose of implementing this Code section.

(e) Any person who suffers injury or damages as a result of a violation of this Code section may bring an action in any court of competent jurisdiction for actual damages, which shall be presumed to be not less than $100.00, together with court costs. A court shall award three times actual damages for an intentional violation of this Code section.

(f) It shall be unlawful and punishable by a fine of $1,000.00 for any towing and storage firm, permitted or unpermitted, licensed or unlicensed, to enter into any agreement with any person in possession of private property to provide automatic or systematic surveillance of such property for purposes of removal and relocation of any such vehicle or trespassing personal property except upon call by such person in possession of such private property to such towing and storage firm for each individual case of trespass; provided, further, that it shall be unlawful and punishable by a fine of $1,000.00 for any towing and storage firm to pay to any private property owner or one in possession of private property any fee or emolument, directly or indirectly, for the right to remove a vehicle or trespassing personal property from said private property. (Ga. L. 1962, p. 146, § 1; Ga. L. 1968, p. 321, § 1; Ga.

L. 1973, p. 2622, § 1; Ga. L. 1982, p. 2107, § 46; Ga. L. 1987, p. 1442, § 1; Ga. L. 1989, p. 1230, § 1; Ga. L. 1990, p. 8, § 44; Ga. L. 2003, p. 881, §§ 1, 2; Ga. L. 2005, p. 60, § 44/HB 95; Ga. L. 2005, p. 334, § 26-1/HB 501; Ga. L. 2007, p. 228, § 1/HB 316; Ga. L. 2012, p. 580, § 12/HB 865; Ga. L. 2013, p. 838, § 19/HB 323.)

The 2012 amendment, effective July 1, 2012, substituted "'Department' means the Department of Public Safety" for "'Commission' means the Public Service Commission" in paragraph (a)(1); substituted "department" for "commission" throughout this Code section; and, in paragraph (b)(2), substituted "department's" for "commission" in the middle of the first sentence, and inserted "department" in the last sentence.

The 2013 amendment, effective July 1, 2013, added the second and third sentences in paragraph (d)(2). See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "commission" was deleted following "by the" in the last sentence of paragraph (b)(2).

Editor's notes. — Ga. L. 2013, p. 838, § 20/HB 323, not codified by the General Assembly, provides, in part: "This Act shall become effective on July 1, 2013, and shall apply to violations committed on or after such date."

CHAPTER 2

RECORDATION AND REGISTRATION OF DEEDS AND OTHER INSTRUMENTS

Article 1

Recording

Part 1

Recording of Deeds and Other Real Property Transactions

Sec.

Article 2

Land Registration

Part 2

Proceedings to Register

Sec.

Part 3

Examiners

Part 4

Registers and Registration

ARTICLE 1

RECORDING

Law reviews. — For article, "Eleventh Circuit Survey: January 1, 2013 - December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

Part 1

Recording of Deeds and Other Real Property Transactions

Law reviews. — For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

44-2-1. Where and when deeds recorded; priority as to subsequent deeds taken without notice from same vendor.

Law reviews. — For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration
Priority of Deeds from Same Vendor
2. Notice

General Consideration

Written instruments of title favored.

Neighbor's 2008 deeds were recorded before the brothers' 1977 deed and the brother's repeated and visible activities in the riverbed did not put the neighbor on notice of the brothers' claim to own the entire riverbed; all of the brothers' activities were consistent with the brothers' easement rights and the trial court did not err in concluding that the neighbor was an innocent purchaser who bought the riverbed without notice that the brothers claimed ownership. Thomas v. Henry County Water & Sewerage Auth., 317 Ga. App. 258, 731 S.E.2d 66 (2012).

Priority of Deeds from Same Vendor

2. Notice

Chapter 13 trustee was bona fide purchaser. — When a security deed executed by Chapter 13 debtors had the correct street address for the collateral but an incorrect legal description, the secured creditor was not entitled to postconfirmation reformation of the deed because the Chapter 13 trustee was a hypothetical bona fide purchaser; there was nothing in the chain of title that would have put the trustee on constructive or inquiry notice of the defect. Midfirst Bank v. Hill (In re Hill), No. 09-01082, 2010 Bankr. LEXIS 3484 (Bankr. S.D. Ga. Sept. 29, 2010).

44-2-2. Duty of clerk to record certain transaction affecting real estate and personal property; priority or recorded instruments; effect of recording on rights between parties to instruments.

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in Bayview Loan Servicing, LLC v. Baxter, 312 Ga. App. 826, 720 S.E.2d 292 (2011).

Applicability

Materialman's lien had priority over later recorded security deed. — Subcontractor's lien filed before a lender's security deed was superior to the deed pursuant to O.C.G.A. § 44-2-2(b). The general contractor's affidavit that the subcontractors had been or will be paid was insufficient to satisfy the plain language of O.C.G.A. § 44-14-361.2(a), requiring a statement that payment had been made, and did not extinguish the lien. Ga. Primary Bank v. Atlanta Paving, Inc., 309 Ga. App. 851, 711 S.E.2d 409 (2011).

Priorities

3. Notice

What constitutes notice of prior deed.

Neighbor's 2008 deeds were recorded before the brothers' 1977 deed and the brother's repeated and visible activities in the riverbed did not put the neighbor on notice of the brothers' claim to own the entire riverbed; all of the brothers' activities were consistent with the brothers' easement rights and the trial court did not err in concluding that the neighbor was an innocent purchaser who bought the riverbed without notice that the brothers claimed ownership. Thomas v. Henry County Water & Sewerage Auth., 317 Ga. App. 258, 731 S.E.2d 66 (2012).

44-2-3. Voluntary deeds or conveyances of land; effect of recording.

JUDICIAL DECISIONS

Avoidance by bankruptcy trustee. — Bankruptcy trustee was entitled to avoid a lien on real property under the strong arm powers because a hypothetical bona fide purchaser of the property would have prevailed over the bank's interest as of the date of the commencement of the case; the bank's cancellation of a lien was the last document in the records. Moreover, the bank failed to reinstate the security deed prior to the trustee's intervention as a bona fide purchaser. AFB&T v. Custom Contrs. & Assocs. (In re Custom Contrs. & Assocs.), No. 09-01002, 2009 Bankr. LEXIS 5715 (Bankr. S.D. Ga. Dec. 3, 2009).

Chapter 13 trustee was bona fide purchaser. — When a security deed executed by Chapter 13 debtors had the correct street address for the collateral but an incorrect legal description, the secured creditor was not entitled to postconfirmation reformation of the deed because the Chapter 13 trustee was a hypothetical bona fide purchaser; there was nothing in the chain of title that would have put the trustee on constructive or inquiry notice of the defect. Midfirst Bank v. Hill (In re

Hill), No. 09-01082, 2010 Bankr. LEXIS 3484 (Bankr. S.D. Ga. Sept. 29, 2010).

44-2-4. Protection of good faith purchases and liens without notice against unrecorded liens or conveyances.

JUDICIAL DECISIONS

Impact of failure to probate a will. — Trial court did not err in granting a bank's motion for summary judgment in the bank's quiet title action against a testator's niece and great-niece on the ground that under O.C.G.A. § 44-2-4(a), the priority of a security deed the testator's stepson gave to a mortgage company, which assigned its interest in the property to the bank, was protected from the interests the niece and great-niece held that were grounded in the testator's unrecorded will because there was nothing in the record that would render O.C.G.A. § 44-2-4(a) inapplicable since the notice created by the possession of the niece and great-niece was only constructive notice, and there was no evidence that the company had any actual notice of the will or of the interests created thereby; the statute applies equally to give protection to those who take an interest in realty when there are other interests that exist, but are not of record, because of a failure to probate a will. Riggins v. Deutsche Bank Nat'l Trust Co., 288 Ga. 850, 708 S.E.2d 266 (2011).

44-2-5. Recording execution and deed after sheriff's sale.

A purchaser at a sheriff's sale may have the execution under which the property was sold recorded with his or her deed together with all the entries on the execution. (Laws 1845, Cobb's 1851 Digest, p. 179; Code 1863, § 2671; Code 1868, § 2667; Code 1873, § 2709; Code 1882, § 2709; Civil Code 1895, § 3625; Civil Code 1910, § 4207; Code 1933, § 29-412; Ga. L. 2011, p. 99, § 76/HB 24.)

The 2011 amendment, effective January 1, 2013, inserted "or her" in the first sentence and deleted the second sentence, which read: "In the event of the loss or destruction of the original execution, a copy of the record shall be admitted in evidence." See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

44-2-12. Rerecording lost or destroyed deeds and other instruments; validity.

Cross references. — Admissibility of other evidence, § 24-10-1004. Admission of public records, § 24-10-1005.

44-2-14. Requirements for recordation.

(a) Except for documents electronically filed as provided for in Chapter 12 of Title 10, and in other Code sections in this part, before any deed to realty or personalty or any mortgage, bond for title, or other recordable instrument executed in this state may be recorded, it shall be an original instrument and shall be attested or acknowledged as provided by law. However, nothing in this Code section shall dispense with another witness where an additional witness is required. This Code section shall not apply to transactions covered by Article 9 of Title 11.

(b) No affidavit prepared under Code Section 44-2-20 and no instrument by which the title to real property or any interest therein is conveyed, created, assigned, encumbered, disposed of, or otherwise affected shall be entitled to recordation unless the name and mailing address of the natural person to whom the affidavit or instrument is to be returned is legibly printed, typewritten, or stamped upon such affidavit or instrument at the top of the first page thereof.

(c) If an instrument or affidavit is titled or recorded without compliance with subsection (b) of this Code section, such noncompliance does not alone impair the validity of the filing of recordation or of the constructive notice imparted by filing or recordation.

(d) Subsection (b) of this Code section does not apply to the following:

(1) An affidavit or instrument executed before July 1, 1994;

(2) A decree, order, judgment, or writ of any court;

(3) A will; or

(4) Any plat. (Laws 1785, Cobb's 1851 Digest, p. 164; Laws 1827, Cobb's 1851 Digest, pp. 171, 172; Laws 1839, Cobb's 1851 Digest, p. 177; Laws 1850, Cobb's 1851 Digest, pp. 180, 181; Ga. L. 1849-50, p. 149, § 1; Ga. L. 1853-54, p. 26, § 1; Code 1863, § 2668; Code 1868, § 2664; Code 1873, § 2706; Code 1882, § 2706; Ga. L. 1893, p. 37, § 1; Civil Code 1895, § 3620; Civil Code 1910, § 4202; Ga. L. 1924, p. 83, § 1; Ga. L. 1931, p. 153, § 1; Code 1933, § 29-405; Ga. L. 1963, p. 188, § 39; Ga. L. 1994, p. 1943, § 1; Ga. L. 2012, p. 173, § 1-33/HB 665.)

The 2012 amendment, effective July 1, 2012, in the first sentence of subsection (a), substituted "Except for documents electronically filed as provided for in Chapter 12 of Title 10, and in other Code sections in this part, before" for "Before" at the beginning and substituted "shall be an original instrument and shall be" for "must be" near the end.

JUDICIAL DECISIONS

Attestation of security deed. — First sentence of O.C.G.A. § 44-14-33 and the statutory recording scheme indicate that the word "duly" in the second sentence of § 44-14-33 should be understood to mean that a security deed is "duly filed, recorded, and indexed" only if the clerk responsible for recording determines, from the face of the document, that it is in the proper form for recording, meaning that it is attested or acknowledged by a proper officer and (in the case of real property) an additional witness; the General Assembly chose to enact the 1995 amendment to O.C.G.A. § 44-14-33 not as a freestanding Code provision but as an addition to a Code provision clearly referenced by O.C.G.A. § 44-14-61, and the General Assembly is presumed to have been aware of the existing state of the law when the legislature enacted the 1995 amendment so the placement of the amendment makes complete sense. United States Bank Nat'l Ass'n v. Gordon, 289 Ga. 12, 709 S.E.2d 258 (2011).

Cited in Gordon v. Ameritrust Mortg. Co. LLC (In re Nesbitt), No. 11-5251, 2013 Bankr. LEXIS 3979 (Bankr. N.D. Ga. Sept. 13, 2013).

44-2-15. Officers authorized to attest registrable instruments.

JUDICIAL DECISIONS

Lack of attestation or acknowledgment as affecting notice.

Bankruptcy trustee was entitled to avoid a security deed, pursuant to 11 U.S.C. § 544, because the security deed was not duly recorded as the security deed did not appear to have two signatures and, therefore, did not appear to comply with all the statutory requirements under O.C.G.A. §§ 44-2-15 and 44-14-33. Gordon v. Ameritrust Mortg. Co. LLC (In re Nesbitt), No. 11-5251, 2013 Bankr. LEXIS 3979 (Bankr. N.D. Ga. Sept. 13, 2013).

Trustee was entitled to avoid a creditor's security interest under the strong arm powers because it was not validly perfected under Georgia law; a security deed did not contain the requisite signature of an unofficial witness. One affidavit failed to meet the incorporation requirement set out in the security deed, and an attorney's affidavits did not properly show that the attorney witnessed a debtor's execution of the security deed; rather, the affidavits were merely an affirmation that the attorney's explanations preceded the debtor's execution. Gordon v. OneWest Bank FSB, (In re Blackmon), 509 B.R. 415 (Bankr. N.D. Ga. 2014).

44-2-18. Recording deed upon affidavit of subscribing witness; effect of substantial compliance.

Law reviews. — For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

44-2-20. Recorded affidavits relating to land as notice of facts cited therein; filing and recording.

(a) Recorded affidavits shall be notice of the facts therein recited, whether taken at the time of a conveyance of land or not, where such affidavits show:

(1) The relationship of parties or other persons to conveyances of land;

(2) The relationship of any parties to any conveyance with other parties whose names are shown in the chain of title to lands;

(3) The age or ages of any person or persons connected with the chain of title;

(4) Whether the land embraced in any conveyance or any part of such land or right therein has been in the actual possession of any party or parties connected with the chain of title;

(5) The payment of debts of an unadministered estate;

(6) The fact or date of death of any person connected with such title;

(7) Where such affidavits relate to the identity of parties whose names may be shown differently in chains of title;

(8) Where such affidavits show the ownership or adverse possession of lands or that other persons have not owned such lands nor been in possession of same; or

(9) Where such affidavits state any other fact or circumstance affecting title to land or any right, title, interest in, or lien or encumbrance upon land.

Any such affidavits may be made by any person, whether connected with the chain of title or not.

(b) Reserved.

(c) Affidavits referred to in subsection (a) of this Code section shall be filed by the clerk of the superior court of the county where the land is located and shall contain a caption referring to the current owner and to a deed or other recorded instrument in the chain of title of the affected land. The clerk of the superior court shall record such affidavits, shall enter on the deed or other recorded instrument so referred to the book and page number on which such affidavit may be recorded, and shall index same in the name of the purported owner as shown by such caption in both grantor and grantee indexes in deed records as conveyances of lands are recorded and indexed; and the clerk shall receive the same compensation therefor as for recording deeds to lands. (Ga. L. 1955, p. 614, §§ 1-3; Ga. L. 1982, p. 3, § 44; Ga. L. 2011, p. 99, § 77/HB 24.)

The 2011 amendment, effective January 1, 2013, substituted "Reserved" for the former provisions of subsection (b), which read: "(b) In any litigation over any of the lands referred to and described in any of the affidavits referred to in subsection (a) of this Code section in any court in this state or in any proceedings in any such court involving the title to such lands wherein the facts recited in such affidavits may be material, the affidavits or certified copies of the record thereof shall be admissible in evidence and there shall be a rebuttable presumption that the state-

ments in said affidavits are true. The affidavits or certified copies thereof shall only be admissible as evidence in the event the parties making the affidavits are deceased; they are nonresidents of the state; their residences are unknown to the parties offering the affidavits; or they are too old, infirm, or sick to attend court."; and, in subsection (c), substituted "subsection (a)" for "subsections (a) and (b)" in the first sentence and substituted "the clerk" for "he" near the end of the last sentence. See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Recorded affidavits not conveyances. — O.C.G.A. §§ 14-5-46 and 14-5-47 were not applicable to a national church's action to quiet title in property held by a local church because there was no deed of conveyance to the trustees of the local church; two recorded title affidavits executed by lifetime attendees of the local church, one 79 years old and the other 80, asserted there had never been a question concerning the church's right of ownership of the property, but recorded affidavits relating to land were not conveyances or a legal proceeding by which one could attack the title to realty or cure a defect in the title, O.C.G.A. § 44-2-20. Kemp v. Neal, 288 Ga. 324, 704 S.E.2d 175 (2010).

Ga. L. 1955, p. 614, §§ 1-3 (see O.C.G.A. § 44-2-20) provided an exception to both the hearsay rule and to former Code 1933, § 38-1603 (see now O.C.G.A. § 24-6-601), relating to competency of witnesses. King v. King, 238 Ga. 268, 232 S.E.2d 549 (1977).

44-2-21. Recording instrument executed out of state; attestation and acknowledgment; validity of attestation by officer who appears to have no jurisdiction to attest the instrument.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Fraudulent deed was facially regular and operated to release security interest. — A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823 (2010).

44-2-22. Legal effect of good record title for 40 years.

JUDICIAL DECISIONS

Deed referencing a plat with certain description established boundary. — In a boundary dispute, pursuant to O.C.G.A. § 44-2-22, a landowner established a prima facie case upon showing good record title for a period of 40 years: the landowner's 1956 deed referenced a survey plat that described the boundary with certain metes and bounds and measurements, while the neighbors' 1936 deed provided insufficient means to determine the boundary. Mathews v. Cloud, 294 Ga. 415, 754 S.E.2d 70 (2014).

44-2-23. When deed serves as evidence; effect of affidavit alleging forgery.

Reserved. Repealed by Ga. L. 2011, p. 99, § 78 /HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Laws 1812, Cobb's 1851 Digest, p. 167; Laws 1827, Cobb's 1851 Digest, p. 172; Laws 1841, Cobb's 1851 Digest, p. 178; Ga. L. 1855-56, p. 143, § 1; Code 1863, § 2674; Code 1868, § 2670; Code 1873, § 2712; Code 1882, § 2712; Civil Code 1895, § 3628; Civil Code 1910, § 4210; Code 1933, § 29-415. For present provisions, see § 24-8-803.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

44-2-26. Recording of plat or copy of plat — When and where authorized; duty of clerk.

The owner of real property or of any interest therein or any holder of a lien thereon may have a plat of the property or a blueprint, tracing, digital copy, or other copy of a plat of the property recorded and indexed in the office of the clerk of the superior court of the county in which the property or any part thereof is located. It shall be the duty of the clerk to record and index any plat or any blueprint, tracing, digital copy, or other copy of the plat that conforms with Code Section 15-6-67. (Ga. L. 1937, p. 746, § 1; Ga. L. 2012, p. 173, § 1-34/HB 665.)

The 2012 amendment, effective July 1, 2012, substituted "digital" for "photostatic" twice in this Code section, and added "that conforms with Code Section 15-6-67" at the end of the last sentence.

ARTICLE 2

LAND REGISTRATION

PART 1

IN GENERAL

44-2-40. Short title.

Law reviews. — For article, "Tracing Georgia's English Common Law Equity Jurisprudential Roots: Quia Timet," see 14 The Journal of Southern Legal History 135 (2006).

44-2-44. Fraudulent acts by office of clerk personnel; penalties.

JUDICIAL DECISIONS

Cited in DeKalb County Sch. Dist. v. Ga. State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827 (2013).

PART 2

PROCEEDINGS TO REGISTER

44-2-83. Conclusiveness of decree; effect of disability on conclusiveness; recourse of persons under a disability against assurance fund.

Every decree rendered as provided in this article shall bind the land and bar all persons claiming title thereto or interest therein, shall quiet the title thereto, and shall be forever binding and conclusive upon and against all persons, including this state, whether mentioned by name in the order of publication or included under the general description "whom it may concern." It shall not be an exception to the conclusiveness of the decree that the person is a minor, is incompetent by reason of mental illness or intellectual disability, or is under any other disability; but said person may have an action against the assurance fund provided for in Part 6 of this article. (Ga. L. 1917, p. 108, § 27; Code 1933, § 60-223; Ga. L. 2015, p. 385, § 4-8/HB 252.)

The 2015 amendment, effective July 1, 2015, in the last sentence, substituted "intellectual disability" for "retardation" and inserted "other".

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

PART 3

EXAMINERS

44-2-101. Referral of case to examiner; preliminary report; contents; time of filing.

Upon the filing of a petition as provided in this article, the clerk shall at once notify the judge who shall refer the action to one of the general examiners or to a special examiner. It shall then become the duty of the examiner to make up a preliminary report containing an abstract of the title to the land from public records and all other evidence of a trustworthy nature that can reasonably be obtained by the examiner, which abstract shall contain:

(1) Extracts from the records and other matters referred to therein which are complete enough to enable the court to decide the questions involved;

(2) A statement of the facts relating to the possession of the lands; and

(3) The names and addresses, so far as the examiner is able to ascertain, of all persons interested in the land as well as all adjoining owners showing their several apparent or possible interests and indicating upon whom and in what manner process should be served or notices given in accordance with this article.

The preliminary report of the examiner shall be filed in the office of the clerk of the superior court on or before the return day of the court as stated in the process unless the time for filing the report is extended by the court. (Ga. L. 1917, p. 108, § 16; Code 1933, § 60-302; Ga. L. 1982, p. 3, § 44; Ga. L. 2011, p. 99, § 79/HB 24.)

The 2011 amendment, effective January 1, 2013, substituted "the examiner" for "him" near the end of the introductory paragraph and deleted the former last sentence of this Code section, which read: "The report shall be prima-facie evidence of the contents thereof." See editor's note for applicability.

Editor's notes. — Ga. L. 2011, p. 99, § 101, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

PART 4

REGISTERS AND REGISTRATION

44-2-131. Declaration of title by descent upon petition; service of petition and publication of notice; transfer of registered title and issuance of new certificates; rights of surviving spouse.

(a) Where the owner of registered land dies intestate and there is no administration upon the estate within 12 months from the date of his death or in the event administration shall terminate without the land being disposed of, the heirs at law of the intestate or any one or more of the persons who claim to be heirs at law of the intestate may petition the superior court of the county to have their title by descent declared as to the registered land.

(b) The petition:

(1) Shall set forth the names of all persons who are alleged to be the heirs at law and, if all are not joined, process or notice shall be served upon all those not joined;

(2) Shall be verified by the affidavit of one of the petitioners;

(3) Shall set forth in detail the name and last known address of the decedent;

(4) Shall include a statement whether he was married, single, or a widower and, if married more than once, the names of all of his wives;

(5) Shall include the names of all children and descendants of children, if any, showing in detail whether the parents of such children are living or dead;

(6) Shall show in detail how and whether the persons who are alleged to be the heirs at law are in fact the heirs at law of such decedent under the rules of inheritance;

(7) Shall give the date of the death of the decedent;

(8) Shall set forth that the decedent died leaving no will; and

(9) Shall state that in the judgment of the applicant there is no need for administration upon the estate.

(c) Upon the petition being filed, the judge shall grant an order setting the petition down to be heard at the courthouse in the county where the land is located, on some day not less than 30 days from the date of the petition, and calling on all persons to show cause before the court on that day why the persons named as heirs at law in the petition should not be so declared to be by the judgment and decree of the court.

A copy of the petition and the order of the court thereon shall be published in the newspaper in which the sheriff's sales of the county are advertised in like manner as sheriff's sales are advertised.

(d) On the day named for the hearing, unless the matter is continued by order or orders of the judge to some future time, the court shall proceed to hear and determine the question together with any objections which may be filed and to adjudge and decree that the alleged decedent is dead, that there is no administration on his estate, that he left no will, and who are his heirs at law; provided, however, if it appears that either the alleged decedent is not dead, or that there is administration upon the estate, or that an application for administration is pending, or that the decedent left a will, the petition shall be dismissed.

(e) Upon granting an order of heirship, the court shall order a transfer of the registered title from the decedent to the heirs at law; and, upon production of the owner's certificate of the decedent and the judge's order for a transfer, the clerk shall register the transfer, cancel the certificate registered in the name of the decedent, cancel the owner's certificate, and issue a new owner's certificate in the name of the persons declared to be the heirs at law.

(f) In the petition if the alleged heirs at law are of full age and under no disabilities and the same so appears to the court and if it further appears that they have voluntarily partitioned the land in kind among themselves, the court may, in connection with the order of transfer, direct that the certificate standing in the name of the decedent be canceled and that new certificates be registered and issued to each of the heirs for the particular parcel of land coming to each under the voluntary partition set forth in the petition.

(g) If the decedent has left a widow, she shall be a party to the proceedings. The court shall specifically provide what interest or estate she shall take under the decree of heirship; and, except where in the decree the land is partitioned into separate tracts, the court shall, in the decree of heirship and in the order of transfer, specifically set forth, except where the widow is the sole heir, what undivided interest each heir shall take.

(h) If the decedent is a female, the procedure shall be similar except insofar as the difference between the rights of the husband and wife upon the death of the spouse shall make changes necessary.

(i) Where the wife claims to be entitled to take possession of the estate without administration under former Code Section 53-4-2 as such existed on December 31, 1997, if applicable, or Code Sections 53-1-7 and 53-2-1, the procedure shall be substantially in the same manner. (Ga. L. 1917, p. 108, § 45; Code 1933, § 60-409; Ga. L. 1998, p. 128, § 44; Ga. L. 2011, p. 752, § 44/HB 142.)

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted "former Code Section 53-4-2 as such existed on December 31, 1997, if applicable, or Code Sections 53-1-7 and 53-2-1," for "Code Section 53-4-2 of the 'Pre-1998 Probate Code,' if applicable, or Code Sections 53-1-7 and 53-2-1 of the 'Revised Probate Code of 1998,'" in subsection (i).

CHAPTER 3

REGULATION OF SPECIALIZED LAND TRANSACTIONS

Article 1

Georgia Land Sales Act

Article 3

Condominiums

ARTICLE 1

GEORGIA LAND SALES ACT

44-3-7. Willful violation of article; effect on statutory or common-law right to punish violations; effect of article on Attorney General.

(a) Except as provided in subsection (b) of this Code section, any person who shall willfully violate any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not more than $1,000.00 or imprisonment not to exceed 12 months, or both.

(b) Any person who shall willfully violate paragraph (2) of subsection (a) of Code Section 44-3-5 or subsection (d) of Code Section 44-3-5 shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000.00 or imprisonment for not less than one and not more than five years, or both.

(c) Nothing in this article shall limit any statutory or common-law right of the state to punish any person for violation of any law.

(d) Nothing in this article shall be deemed to prohibit the Attorney General from exercising any powers under Part 2 of Article 15 of Chapter 1 of Title 10 against any person. (Ga. L. 1972, p. 638, § 18; Code 1981, § 44-3-27; Code 1981, § 44-3-10, enacted by Ga. L. 1982, p. 1431, § 1; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 606, § 1; Code 1981, § 44-3-7, as redesignated by Ga. L. 1995, p. 993, § 1; Ga. L. 2015, p. 1088, § 33/SB 148.)

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "administrator appointed under Part 2 of Article 15 of Chapter 1 of Title 10" in the middle of subsection (d).

ARTICLE 3

CONDOMINIUMS

44-3-70. Short title.

JUDICIAL DECISIONS

Condominium association had no duty to remove snow and ice. — Trial court properly granted a condominium association summary judgment in a premises liability action because interpreting the condominium association documents established that the association did not have a duty to remove snow and ice from the common walkway where the resident fell. Scrocca v. Ashwood Condominium Ass'n, 326 Ga. App. 226, 756 S.E.2d 308 (2014).

44-3-71. Definitions.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 64 Mercer L. Rev. 325 (2012).

44-3-80. Allocation — Liability for common expenses; how assessments made.

(a) Except to the extent that the condominium instruments provide otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common element shall be specially assessed against the condominium unit to which that limited common element was assigned at the time the expenses were made or incurred; however, if any limited common element was assigned at that time to more than one unit, the common expenses shall be specifically assessed against each condominium unit equally so that the total of the special assessments equals the total of the expenses.

(b) To the extent that the condominium instruments expressly so provide:

(1) Any other common expenses benefiting less than all of the units shall be specially assessed equitably among all of the condominium units so benefited;

(2) Any other common expenses occasioned by the conduct of less than all of those entitled to occupy all of the units or by the licensees or invitees of any such unit or units shall be specially assessed against the condominium unit or units, the conduct of any occupant, licensee, or invitee of which occasioned any such common expenses;

(3) Any other common expenses significantly disproportionately benefiting all of the units shall be assessed equitably among all of the condominium units; and

(4) Other than for limited common elements expressly designated as such in the condominium instruments and assigned to fewer than all units, nothing contained in paragraph (1) or (3) of this subsection shall permit an association to specially or disproportionately allocate common expenses for periodic maintenance, repair, and replacement of any portion of the common elements or the units which the association has the obligation to maintain, repair, or replace.

(c) The amount of all common expenses not specially assessed pursuant to subsection (a) or (b) of this Code section, less the amount of all undistributed and unreserved common profits, shall be assessed against the condominium units in accordance with the allocation of liability for common expenses set forth in the declaration. The allocation may be by percentage, fraction, formula, or any other method which indicates the relative liabilities for common expenses. If an equal liability for common expenses is allocated to each unit, the declaration may merely so state. The entire liability for common expenses shall be allocated among the units depicted on plats or plans that comply with subsections (a) and (b) of Code Section 44-3-83 and shall be subject to reallocation as provided in this article. Except to the extent otherwise expressly provided or permitted by this article, the allocations of the liability shall not be altered; provided, however, that no reallocation shall affect any assessment or installation thereof becoming due and payable prior to reallocation. The assessments shall be made by the association annually or more often if the condominium instruments so provide and shall be payable in the manner determined by the association. Notwithstanding any unequal allocation of liabilities for common expenses pursuant to this subsection, this provision shall not preclude the association from levying charges equally among units for services or items provided to owners upon request, or which provide proportionate or uniform benefit to the units, including, but not limited to, uniform charges for pool keys or other common element entry devices.

(d)(1) The declarant shall pay for all common expenses until the first common expense assessment is due from any unit owner. Thereafter, no unit owner other than the association shall be exempted from any liability for any assessment under this Code section or under any condominium instrument for any reason whatsoever, including, without limitation, abandonment, nonuse, or waiver of the use or enjoyment of his or her unit or any part of the common elements.

(2) Notwithstanding paragraph (1) of this subsection, if authorized by the declaration, a declarant who is offering units for sale may elect to be excused from payment of assessments assessed pursuant to subsection (c) of this Code section against those unsold and unoccupied units for a stated period of time after the original declaration is recorded, not to exceed 24 months after the date the original declaration is recorded; provided, however, that as to assessments assessed pursuant to subsection (c) of this Code section, the declarant must pay common expenses incurred during such period which exceed the amounts assessed against other unit owners in the same condominium. During any period in which the declarant is excused from payment of assessments assessed pursuant to subsection (c) of this Code section:

(A) No capital contributions, start-up funds, initiation fees, or contributions to capital reserve accounts which are receivable from unit purchasers or unit owners and payable to the association at closing may be used for payment of common expenses;

(B) No portion of the payment of assessments collected from owners intended to be utilized for reserves for deferred maintenance, reserves for depreciation, or other reserves, as shown on the operating budget for the condominium, may be used for payment of common expenses; and

(C) No prepayments of assessments made by owners shall be used for the payment of common expenses prior to the time the assessments would otherwise be due.

(3) If during the period that the declarant is excused from payment of assessments as provided in paragraph (2) of this subsection common expenses are incurred resulting from a casualty which is not covered by proceeds from insurance maintained by the association, such common expenses shall be assessed against all unit owners owning units on the date of such casualty, and their respective successors and assigns, including the declarant with respect to units owned by the declarant. In the event of such an assessment, all units shall be assessed in accordance with the allocation of the liability for common expenses set forth in the declaration as provided in subsection (c) of this Code section.

(4) During any such time as the declarant has the right to control the association pursuant to Code Section 44-3-101, any capital contributions, start-up funds, initiation fees, or contributions to capital reserve accounts which are receivable from unit purchasers or unit owners and payable to the association at closing and any portion of the payment of assessments collected from owners intended to be utilized for reserves for deferred maintenance, reserves for depreciation, or other reserves, as shown on the operating budget for the condominium, shall be deposited into one or more separate reserve accounts and shall not be used to pay for any common expenses, without the agreement of the unit owners of units to which two-thirds of the votes in the association pertain, exclusive of any vote or votes appurtenant to any unit or units then owned by the declarant. No waiver of the right of any unit owner to grant or withhold consent to such agreement shall be valid.

(e) Unless otherwise provided in the condominium instruments and except as provided in subsection (f) of this Code section, the grantee in a conveyance of a condominium unit shall be jointly and severally liable with the grantor thereof for all unpaid assessments against the latter up to the time of the conveyance without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor; provided, however, that, if the grantor or grantee shall request a statement from the association as provided in Code Section 44-3-109, such grantee and his successors, successors-in-title, and assigns shall not be liable for nor shall the condominium unit conveyed be subject to a lien for any unpaid assessments against such grantor in excess of any amount set forth in the statement.

(f) In the event that the holder of a first priority mortgage or a secondary purchase money mortgage of record, provided that neither the grantee nor any successor grantee on the secondary purchase money mortgage is the seller of the unit, or any other person acquires title to any condominium unit as a result of foreclosure of any such mortgage, such holder or other person and successors, successors-in-title, and assigns shall not be liable for nor shall the condominium unit be subject to a lien for any assessment under this Code section or under any condominium instrument chargeable to the condominium unit on account of any period prior to the acquisition of title; provided, however, that the unpaid share of an assessment or assessments shall be deemed to be common expenses collectable from all of the unit owners, including such holder or other person and successors, successors-in-title, and assigns.

(g) A condominium instrument recorded on or after July 1, 2015, shall not authorize the board of directors to impose:

(1) Except as provided in subsections (a) and (b) of this Code section and subsections (a) and (b) of Code Section 44-3-109, a special

assessment fee per unit in excess of one-sixth of the annual common expense assessment for the unit levied pursuant to subsection (c) of this Code section per fiscal year without the approval of a majority of the unit owners; or

(2) A monthly maintenance fee increase in excess of the percentage equal to the annual rate of inflation as measured by the Consumer Price Index for All Urban Consumers for the immediately preceding 12 month period may be disapproved by unit owners holding a majority of the association vote. (Ga. L. 1975, p. 609, § 17; Ga. L. 1990, p. 227, § 3; Ga. L. 1994, p. 1943, §§ 3, 4; Ga. L. 2004, p. 560, § 3; Ga. L. 2007, p. 611, § 2/HB 383; Ga. L. 2015, p. 889, § 1/HB 245.)

The 2015 amendment, effective July 1, 2015, substituted "July 1, 2015" for "July 1, 1990" in subsection (g); and substituted "one sixth of the annual common expense assessment for the unit levied pursuant to subsection (c) of this Code section" for "an average of $200.00" in the middle of paragraph (g)(1).

JUDICIAL DECISIONS

Liability of unit owner for assessment.

Condominium association's property manager's affidavit, in which the manager testified that the manager was familiar with the billing processes of the association and the association's records and that the manager's affidavit was on personal knowledge, was sufficient to support summary judgment for the association in the association's action against an owner for assessments and fees. Because the declaration provided for attorney's fees, an award of attorney's fees was mandated under O.C.G.A. § 44-3-109(b)(3), although the association did not ask for the fees. Ellington v. Gallery Condo. Ass'n, 313 Ga. App. 424, 721 S.E.2d 631 (2011).

Common expenses. — Plaintiff condominium association could not assess against defendant owner's unit, as common expenses under O.C.G.A. § 44-3-80(b)(2), legal fees and interest in connection with enforcing restraining orders against a former occupant since the occupant had moved before those expenses were incurred. One Buckhead Loop Condo. Ass'n v. Pew, No. 11-13340, 2012 U.S. App. LEXIS 13688 (11th Cir. July 5, 2012) (Unpublished).

44-3-94. Damage or destruction of units; restoration; vote not to restore; allocation of insurance deductible.

Unless otherwise provided in the condominium instruments, in the event of damage to or destruction of any unit by a casualty covered under insurance required to be maintained by the association pursuant to Code Section 44-3-107, the association shall cause the unit to be restored. Unless otherwise provided in the condominium instruments, any funds required for such restoration in excess of the insurance proceeds attributable thereto shall be paid by the unit owner of the unit; provided, however, that, in the event that the unit owner of the unit together with the unit owners of other units to which two-thirds of the votes in the association pertain agree not to restore the unit, the

unit shall not be restored and the entire undivided interest in the common elements pertaining to that unit shall then pertain to the remaining units, to be allocated to them in proportion to their undivided interests in the common elements, and the remaining portion of that unit shall thenceforth be a part of the common elements. Votes in the association and liability for future common expenses shall thereupon pertain to the remaining units, being allocated to them in proportion to their relative voting strength in the association and liability for common expenses, respectively. To the extent provided for in the condominium instruments, the association may allocate equitably the payment of a reasonable insurance deductible between the association and the unit owners affected by a casualty against which the association is required to insure; provided, however, that the amount of deductible which can be allocated to any one unit owner shall not exceed $5,000.00 per casualty loss covered under any insurance required to be maintained by the association under this article. The existence of a reasonable deductible in any required insurance policy shall not be deemed a failure to maintain insurance as required by this Code section. (Ga. L. 1975, p. 609, § 7; Ga. L. 1983, p. 3, § 33; Ga. L. 1990, p. 227, § 8; Ga. L. 2004, p. 560, § 4; Ga. L. 2013, p. 890, § 1/HB 458.)

The 2013 amendment, effective July 1, 2013, substituted "$5,000.00" for "$2,500.00" near the end of the next-to-last sentence of this Code section.

44-3-101. Control of association by declarant; surrender of control to unit owners; liability for books and records; cancellation of leases and contracts.

(a) If provided for in the condominium instruments and subject to any limitations contained in the condominium instruments, the association's articles of incorporation, the association's bylaws, or this article with respect thereto, the declarant shall be authorized to appoint and remove any member or members of the board of directors and any officer or officers of the association. The declarant's authority to appoint and remove members of the board of directors and officers of the association shall in no event extend beyond and shall in all cases expire immediately upon the occurrence of any of the following:

(1) The expiration of any time limit specified for such purpose in the condominium instruments, which time limit may not be enlarged or extended after the conveyance by the declarant of a condominium unit without the express consent of all unit owners;

(2) Unless the declarant at that time has an unexpired option to add additional property, the date as of which units to which four-fifths of the undivided interests in the common elements pertain shall have

been conveyed by the declarant to unit owners other than a person or persons constituting the declarant;

(3) The expiration of seven years after the recording of the declaration in the case of an expandable condominium or the expiration of three years after the recording of the declaration in the case of any other type of condominium; or

(4) The surrender by the declarant of the authority to appoint and remove members of the board of directors and officers of the association by an express amendment to the declaration which is executed and recorded by the declarant.

No formal or written proxy or power of attorney need be required of the unit owners to vest such authority to appoint and remove members of the board of directors and officers of the association in the declarant, the acceptance of a conveyance of a condominium unit being wholly sufficient for such purpose.

(b) Upon the expiration of the period of the declarant's right to control the association pursuant to subsection (a) of this Code section, the right to control shall automatically pass to the unit owners, including the declarant if the declarant then owns one or more condominium units. The declarant shall be jointly responsible and liable with the members of the board of directors and the officers of the association to the unit owners for ensuring that the books, records, and accounts of the association are in proper order, that the association is in good standing under the laws of this state, and that the affairs of the association have been conducted in a prudent and businesslike manner, all as of the date upon which the declarant's right to control the association expires. The declarant shall not be insulated against liability to the unit owners because any act, omission, or matter complained of during such period of control may have been done, omitted, or permitted by or on behalf of the association as a corporate entity. Nothing contained in this Code section shall make any successor to the declarant responsible or subject to liability by operation of law or through the purchase of the declarant's interest in the property or any part thereof at foreclosure for any act, omission, or matter occurring or arising from any act, omission, or matter occurring prior to the time the successor succeeded to the interest of the declarant.

(c) Notwithstanding and prior to the usual expiration of the period of the declarant's right to control the association pursuant to subsection (a) of this Code section, the right to control also may pass to the unit owners as provided in this subsection if the declarant fails to do any of the following: (1) incorporate the association pursuant to subsection (a) of Code Section 44-3-100; (2) cause the board of directors to be duly appointed and the officers to be elected pursuant to subsection (b) of

Code section 44-3-100; (3) maintain and make available to owners, upon written request, a list of the names and business or home addresses of the association's current directors and officers; (4) call meetings of the members of the association in accordance with the provisions of the association's bylaws at least annually pursuant to Code Section 44-3-102; or (5) prepare an annual operating budget and establish the annual assessment and distribute the budget and notice of assessment to the owners in accordance with the condominium instruments no later than 30 days after the beginning of the association's fiscal year. In the event that the declarant fails to meet one or more of the obligations of this subsection, then any owner, acting individually or jointly with other owners, may send the declarant written notice of the failure to comply with such requirements and provide the declarant a 30 day opportunity to cure the failure; and such notice shall be sent by certified mail or statutory overnight delivery to the declarant's principal office. If the declarant fails to cure any or all deficiencies identified in the notice within 30 days of such notice, then any owner, acting individually or jointly with other owners, may file a petition in the superior court of the county in which any portion of the condominium is located in order to obtain an order to grant the owners control of the association. The superior court shall have authority to hold a hearing and issue a summary ruling on said petition at any time designated by the court not earlier than 20 days after the service thereof, unless the parties consent in writing to an earlier trial. If the owners prevail in such action, then the superior court shall award to the owners all reasonable attorney's fees and costs incurred by the owners for the prosecution of such action.

(d) In addition to any right of termination set forth therein, any management contract, any lease of recreational area or facilities, or any other contract or lease executed by or on behalf of the association during the period of the declarant's right to control the association pursuant to subsection (a) of this Code section shall be subject to cancellation and termination at any time during the 12 months following the expiration of such control period by the affirmative vote of the unit owners of units to which a majority of the votes in the association pertain, unless the unit owners by a like majority shall have theretofore, following the expiration of such control period, expressly ratified and approved the same. (Ga. L. 1975, p. 609, § 33; Ga. L. 1990, p. 227, § 9; Ga. L. 2012, p. 1031, § 1/SB 136.)

The 2012 amendment, effective July 1, 2012, added subsection (c) and redesignated former subsection (c) as present subsection (d).

Law reviews. — For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

JUDICIAL DECISIONS

Conditional termination not permitted. — Nothing in O.C.G.A. § 44-3-101(c) permits any "conditional termination," one which may ripen eventually, upon which termination would be effective as of some prior date; although the time limitation in O.C.G.A. § 44-3-101(c) is not a statute of limitation, it serves an analogous function in that it establishes a limited period beyond which an association loses its right thereunder to terminate contracts. Capitol Infrastructure, LLC v. Plaza Midtown Residential Condo. Ass'n, 306 Ga. App. 794, 702 S.E.2d 910 (2010).

Termination of telecommunications contract. — Superior court's judgment declaring that an agreement between a condominium association and a telecommunications company was subject to termination by the association pursuant to O.C.G.A. § 44-3-101 was vacated because the 12-month period of O.C.G.A. § 44-3-101(c) expired without the association having terminated any telecommunications contract, rendering the issue in its declaratory judgment action moot, and the declaratory judgment upon a moot issue was not authorized under the Declaratory Judgment Act, O.C.G.A. § 9-4-1 et seq.; by the time the superior court issued the declaratory judgment, the statutory period of O.C.G.A. § 44-3-101(c) had expired, and any right the association had to cancel and terminate contracts under that statute expired. Capitol Infrastructure, LLC v. Plaza Midtown Residential Condo. Ass'n, 306 Ga. App. 794, 702 S.E.2d 910 (2010).

44-3-103. Quorums at meetings of association or board.

JUDICIAL DECISIONS

Proxies not counted in determining quorum. — Trial court properly held that proxies were not counted in determining whether a quorum was present for a meeting of condominium owners because: (1) the word "member" in a bylaw referred to an individual and not to a proxy authorizing one person to act for another; (2) O.C.G.A. § 44-3-103 affirmed the common law rule requiring the presence of a person entitled to cast a vote to establish a quorum, unless condominium instruments or bylaws provided otherwise; and (3) the condominium association's bylaws did not provide otherwise. Demere Landing Condo. Owners Ass'n v. Matthews, 315 Ga. App. 464, 726 S.E.2d 416 (2012).

44-3-106. Powers and responsibilities of association; tort actions.

(a) Except to the extent prohibited by the condominium instruments and subject to any restrictions and limitations specified therein, the association shall have the power to:

(1) Employ, retain, dismiss, and replace agents and employees to exercise and discharge the powers and responsibilities of the association;

(2) Make or cause to be made additional improvements on and as a part of the common elements; and

(3) Grant or withhold approval of any action by one or more unit owners or other persons entitled to occupancy of any unit if such

action would change the exterior appearance of any unit or of any other portion of the condominium or elect or provide for the appointment of an architectural control committee to grant or withhold such approval.

(b) Except to the extent prohibited by the condominium instruments and subject to any restrictions and limitations specified therein, the association shall have the irrevocable power, as attorney in fact on behalf of all unit owners and their successors in title, to grant easements, leases, and licenses through or over the common elements, to accept easements, leases, and licenses benefiting the condominium or any portion thereof, and to acquire or lease property in the name of the association as nominee for all unit owners. Property so acquired by the association as nominee for the unit owners, upon the recordation of the deed thereto or other instrument granting the same, shall automatically and without more, and for all purposes, including, without limitation, taxation, be a part of the common elements. The association shall also have the power to acquire, lease, and own in its own name property of any nature, real, personal, or mixed, tangible or intangible; to borrow money; and to pledge, mortgage, or hypothecate all or any portion of the property of the association for any lawful purpose within the association's inherent or expressly granted powers. Any third party dealing with the association shall be entitled to rely in good faith upon a certified resolution of the board of directors of the association authorizing any such act or transaction as conclusive evidence of the authority and power of the association so to act and of full compliance with all restraints, conditions, and limitations, if any, upon the exercise of such authority and power. The provisions of Code Section 44-2-2 notwithstanding, any such actions taken by the association as attorney in fact on behalf of all unit owners and their successors in title shall be effective record notice to third parties if recorded in the name of the association as that name is reflected in the recorded declaration or any recorded amendments thereto. Such recorded document shall not require a listing of the names of the unit owners or their successors in title or assigns.

(c) The association shall have the power to amend the condominium instruments, the articles of incorporation, and the bylaws of the association or any of them in such respects as may be required to conform to mandatory provisions of this article or of any other applicable law without a vote of the unit owners.

(d) In addition to any other duties and responsibilities as this article or the condominium instruments may impose, the association shall keep:

(1) Detailed minutes of all meetings of the members of the association and of the board of directors;

(2) Detailed and accurate financial records, including itemized records of all receipts and expenditures; and

(3) Any books and records as may be required by law or be necessary to reflect accurately the affairs and activities of the association.

(e) This Code section shall not be construed to prohibit the grant or imposition of other powers and responsibilities to or upon the association by the condominium instruments.

(f) Except to the extent otherwise expressly required by this article, by Chapter 2 or 3 of Title 14, by the condominium instruments, by the articles of incorporation, or by the bylaws of the association, the powers inherent in or expressly granted to the association may be exercised by the board of directors, acting through the officers, without any further consent or action on the part of the unit owners.

(g) A tort action alleging or founded upon negligence or willful misconduct by any agent or employee of the association or in connection with the condition of any portion of the condominium which the association has the responsibility to maintain shall be brought against the association. No unit owner shall be precluded from bringing such an action by virtue of his ownership of an undivided interest in the common elements or by virtue of his membership in the association. A judgment against the association arising from a tort action shall be a lien against the property of the association.

(h) The association shall have the capacity, power, and standing to institute, intervene in, prosecute, represent in, or defend, in its own name, litigation, administrative or other proceedings of any kind concerning claims or other matters relating to any portions of the units or common elements which the association has the responsibility to administer, repair, or maintain; and such capacity, power, and standing shall not be waived, abridged, modified, or removed by any provision of any contract or document, including the condominium instruments, that were recorded, entered into, or established prior to the expiration of the period of the declarant's right to control the association as set forth in subsection (a) of Code Section 44-3-101.

(i) This Code section shall not alter, modify, or remove the association's obligation to comply with Part 2A of Article 1 of Chapter 2 of Title 8. (Ga. L. 1975, p. 609, § 38; Ga. L. 1990, p. 227, § 11; Ga. L. 1994, p. 1943, § 9; Ga. L. 2014, p. 212, § 1/HB 820.)

The 2014 amendment, effective July 1, 2014, added the language beginning with "; and such capacity" and ending with "Code Section 44-3-101" at the end of subsection (h) and added subsection (i).

Law reviews. — For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014).

44-3-109. Lien for assessments; personal obligation of unit owner; notice and foreclosure; lapse; right to statement of assessments; effect of failure to furnish statement.

Law reviews. — For annual survey on wills, trusts, guardianships, and fiduciary administration, see 64 Mercer L. Rev. 325 (2012).

JUDICIAL DECISIONS

Foreclosure proceedings.

Plaintiff condominium association could not assess against the defendant owner's unit, as common expenses under O.C.G.A. § 44-3-80(b)(2), legal fees and interest in connection with enforcing restraining orders against a former occupant since the occupant had moved before those expenses were incurred; those assessments were not lawfully assessed under O.C.G.A. § 44-3-109(a) and thus could not form the basis for a lien, and since the notice of foreclosure included those amounts, the notice did not comply with § 44-3-109(c). One Buckhead Loop Condo. Ass'n v. Pew, No. 11-13340, 2012 U.S. App. LEXIS 13688 (11th Cir. July 5, 2012) (Unpublished).

Trial court properly allowed a condominium association to foreclose a lien against a debtor's condominium unit and awarded the association damages because O.C.G.A. § 44-3-109 and the condominium documents created a lien in the association's favor and the debtor's bankruptcy discharge had no impact on the association's right to enforce the association's lien since discharges in bankruptcy did not affect liability in rem. Casas-Rodriguez v. Cosmopolitan on Lindbergh Condo. Ass'n, 325 Ga. App. 253, 749 S.E.2d 371 (2013).

Condominium unit owner's claim for constructive eviction was not barred by the owner's failure to plead the eviction in an earlier action by the condominium association for assessments and foreclosure of its lien on the owner's units because the constructive eviction claim did not mature until after the conclusion of the association's suit and was therefore a permissive, not compulsory counterclaim. Elekima v. Abbey Rd. Condo. Ass'n., 331 Ga. App. 357, 771 S.E.2d 63 (2015).

Impact of bankruptcy on lien enforcement. — Bankruptcy discharge has no impact on a condominium association's right to enforce the association's lien as a bankruptcy discharge extinguishes only one mode of enforcing a claim, namely, an action against the debtor in personam, while leaving intact another, namely, an action against the debtor in rem. Casas-Rodriguez v. Cosmopolitan on Lindbergh Condo. Ass'n, 325 Ga. App. 253, 749 S.E.2d 371 (2013).

Attorney fees.

Condominium association's property manager's affidavit, in which the manager testified that the manager was familiar with the billing processes of the association and the association's records and that the manager's affidavit was on personal knowledge, was sufficient to support summary judgment for the association in the association's action against an owner for assessments and fees. Because the declaration provided for attorney's fees, an award of attorney's fees was mandated under O.C.G.A. § 44-3-109(b)(3), although the association did not ask for the fees. Ellington v. Gallery Condo. Ass'n, 313 Ga. App. 424, 721 S.E.2d 631 (2011).

44-3-115. Construction of this article; substantial compliance; procedure for curing defects in recorded instruments.

JUDICIAL DECISIONS

Use of statute to cure defects and breach of contract. — Chapter 11 debtor was not entitled to summary judgment on the debtor's objection to a claim. The issue of the unresolved materiality of purported defects in condominium documents was critical to the determination of whether O.C.G.A. § 44-3-115 could be used to cure the defects and to the underlying breach of contract and warranty claims. In re Foster, No. 11-30021, 2013 Bankr. LEXIS 246 (Bankr. S.D. Ga. Jan. 16, 2013).

ARTICLE 6

PROPERTY OWNERS' ASSOCIATIONS

44-3-220. Short title.

JUDICIAL DECISIONS

Use of easement for access to lake. — Trial court properly found that an easement did not authorize general access to a lake for all members of the homeowners' association but a remand was required as genuine issues existed as to what was reasonably necessary for the enjoyment of the easement and whether a walkway and bridge caused interference and damage to the easement holders. Crabapple Lake Parc Cmty. Ass'n v. Circeo, 325 Ga. App. 101, 751 S.E.2d 866 (2013).

44-3-231. Powers and duties of association; legal actions against agent or employee of association.

JUDICIAL DECISIONS

Property association had standing to intervene. — Property owners' association ("POA") was a "party in interest" under 11 U.S.C. § 1109 and had standing to intervene in a contested matter that was brought by an LLC that purchased property from a developer's ("debtor's") Chapter 11 bankruptcy estate, to determine ownership of common areas in a subdivision the debtor developed, because a ruling in favor of a trustee who was appointed under the debtor's bankruptcy plan that title to the common areas did not pass to the POA could have affected the POA's right to exist; even in the absence of injury to the POA itself, the POA had organizational standing to intervene on behalf of the POA's members. Sea Island Acquisition, LLC v. Barnett (In re Sea Island Co.), No. 10-21034, 2014 Bankr. LEXIS 3237 (Bankr. S.D. Ga. July 30, 2014).

CHAPTER 4

DETERMINATION OF BOUNDARIES

Article 1

Processioning

Sec.
44-4-1 through 44-4-10 [Repealed].

ARTICLE 1

PROCESSIONING

44-4-1 through 44-4-10.

Reserved. Repealed by Ga. L. 2014, p. 695, § 4/HB 790, effective July 1, 2014.

Editor's notes. — This article consisted of Code Sections 44-4-1 through 44-4-10, relating to processioning, and was based on Laws 1798, Cobb's 1851 Digest, p. 716; Laws 1799, Cobb's 1851 Digest, p. 717-718; Laws 1818, Cobb's 1851 Digest, p. 719; Laws 1850, Cobb's 1851 Digest, p. 719; Ga. L. 1853-54, p. 76, § 1; Orig. Code 1863, §§ 2352-2361; Code 1868, §§ 2349-2358; Code 1873, §§ 2384-2393; Code 1882, §§ 2384-2393; Civil Code 1895, §§ 3243-3252; Ga. L. 1901, p. 39, § 1; Ga. L. 1905, p. 83, § 1; Civil Code 1910, §§ 3817-3826; Ga. L. 1912, p. 70, § 1; Ga. L. 1929, p. 167, § 1; Code 1933, §§ 85-1601 through 85-1610; Ga. L. 1953, Jan.-Feb. Sess., p. 202, §§ 1, 2; Ga. L. 1956, p. 326, § 1; Ga. L. 1982, p. 3, § 44; Ga. L. 2011, p. 99, §§ 80, 81/HB 24.

CHAPTER 5

ACQUISITION AND LOSS OF PROPERTY

Article 2

Conveyances

Sec.
44-5-30. Requisites of deed to lands; inquiry into consideration.
44-5-41. Voidance and ratification of conveyance to or by a minor.
44-5-45. When ancient deed admissible without proof of execution [Repealed].

Article 3

Covenants and Warranties

Sec.
44-5-59. Covenant running with the land between property owner and third party.
44-5-60. Covenants running with land; effect of zoning laws; covenants and scenic easements for use of public; renewal of certain covenants; costs.

Article 7

Prescription

44-5-170. Effect of disabilities on commencement of prescription.

ARTICLE 2

CONVEYANCES

44-5-30. Requisites of deed to lands; inquiry into consideration.

Except for documents electronically filed as provided for in Chapter 12 of Title 10 and Part 1 of Article 1 of Chapter 2 of this title, a deed to lands shall be an original document, in writing, signed by the maker, attested by an officer as provided in Code Section 44-2-15, and attested by one other witness. It shall be delivered to the purchaser or his or her representative and be made on a good or valuable consideration. The consideration of a deed may always be inquired into when the principles of justice require it. (Laws 1785, Cobb's 1851 Digest, p. 164; Code 1863, § 2649; Code 1868, § 2648; Code 1873, § 2690; Code 1882, § 2690; Civil Code 1895, § 3599; Civil Code 1910, § 4179; Code 1933, § 29-101; Ga. L. 2012, p. 173, § 1-35/HB 665; Ga. L. 2015, p. 937, § 1/HB 322.)

The 2012 amendment, effective July 1, 2012, substituted "Except for documents electronically filed as provided for in Chapter 12 of Title 10 and Part 1 of Article 1 of Chapter 2 of this title, a deed to lands shall be an original document," for "A deed to lands must be" in the first sentence; and, in the second sentence, substituted "shall" for "must" and inserted "or her".

The 2015 amendment, effective July 1, 2015, substituted "attested by an officer as provided in Code Section 44-2-15, and attested by one other witness" for "and attested by at least two witnesses" at the end of the first sentence.

JUDICIAL DECISIONS

Analysis

General Consideration

Fraudulent deed was facially regular and operated to release security interest. — A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823 (2010).

Bankruptcy impact on improperly recorded deed. — Chapter 7 discharge was not barred by 11 U.S.C. § 727(a)(2). The quitclaim deed by which the debtor transferred the debtor's interest in the marital residence to the debtor's spouse was valid under O.C.G.A. § 44-5-30 despite having been recorded in the wrong county, and the transfer did not occur within a year of the bankruptcy filing. Marvin Hewatt Enters. v. Kyu Sup Mun (In re Kyu Sup Mun), 458 B.R. 628 (Bankr. N.D. Ga. 2011).

Signing

No contract formed when no signature. — With respect to objections to debtor's motion to sell property free and clear of liens and other interests, one objector's claimed easement interest failed because no contract was ever formed, it was not signed by both makers of document, and it was not attested by a second witness as required by Georgia law, and another objector who relied on a sales contract encountered the same problem of failing to comply with formalities, including two witnesses. In re Flyboy Aviation Props., LLC, 501 B.R. 828 (Bankr. N.D. Ga. 2013).

Delivery

2. Acceptance

Sufficient acceptance and control of deed by debtor. — Bankruptcy debtor fraudulently transferred an interest of the debtor in a parent's residence since the parent delivered the deed of the property to the debtor by recording the deed and notifying the debtor and the debtor accepted the deed by asserting control over the property by transferring the debtor's interest to a sibling. Howell v. Trawick (In re Norton), No. 13-1006, 2014 Bankr. LEXIS 3494 (Bankr. N.D. Ga. Aug. 15, 2014).

4. When Made

Leaving the deed in the trunk of a car that was left to the grantee. — Father's unrecorded 2004 deed of a family home place to one of his sons was ineffective because it was not delivered to the son as required by O.C.G.A. § 44-5-30, but was placed in the trunk of the father's car until the father's death in 2009, when he left the car to his son. Johnson v. Johnson, 327 Ga. App. 604, 760 S.E.2d 618 (2014).

44-5-33. Form of deed.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

44-5-39. Binding effect of covenants on grantee who accepts deed.

JUDICIAL DECISIONS

Compliance with restrictive covenants required.

Buyer of subdivision property was bound by covenants restricting the use and development of certain defined common areas because the lender from whom the buyer purchased the property took a deed under power of sale that recited that the property was subject to the covenants. Under O.C.G.A. § 44-5-39, the lender agreed to be bound by the covenants. Interchange Drive, LLC v. Nusloch, 311 Ga. App. 552, 716 S.E.2d 603 (2011).

44-5-40. Conveyance of future interests or estates.

JUDICIAL DECISIONS

Vested remainder found. — Trial court erred in the court's construction of a deed because the deed was clear as written and, as such, the heir received a one-third undivided interest in the property, and the executor individually and the estate each received a one-third undivided interest as the vested remaindermen who each received an interest in the property under O.C.G.A. § 44-6-66. Wilkes v. Fraser, 324 Ga. App. 642, 751 S.E.2d 455 (2013).

44-5-41. Voidance and ratification of conveyance to or by a minor.

A deed, security deed, bill of sale to secure debt, or any other conveyance of property or interest in property to or by a minor is voidable unless such minor has become emancipated by operation of law or pursuant to Article 10 of Chapter 11 of Title 15. If a minor has conveyed property or an interest in property, the minor may void the conveyance upon arrival at the age of 18; and, if the minor makes another conveyance at that time, it will void the first conveyance without reentry or repossession. If property or an interest in property has been conveyed to a minor and, after arrival at the age of 18, the minor retains the possession or benefit of the property or interest in property, the minor shall have thereby ratified or affirmed the conveyance. (Orig. Code 1863, § 2653; Code 1868, § 2652; Code 1873, § 2694; Code 1882, § 2694; Civil Code 1895, § 3604; Civil Code 1910, § 4184; Code 1933, § 29-106; Ga. L. 1966, p. 291, § 2; Ga. L. 1969, p. 640, § 2; Ga. L. 1972, p. 193, § 3; Ga. L. 2006, p. 141, § 7/HB 847; Ga. L. 2013, p. 294, § 4-49/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted "Article 10" for "Article 6" near the end of the first sentence. See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

44-5-45. When ancient deed admissible without proof of execution.

Reserved. Repealed by Ga. L. 2011, p. 99, § 82/HB 24, effective January 1, 2013.

Editor's notes. — This Code section was based on Orig. Code 1863, § 2659; Code 1868, § 2658; Code 1873, § 2700; Code 1882, § 2700; Civil Code 1895, § 3610; Civil Code 1910, § 4190; Code 1933, § 29-112. For comparable provisions, see § 24-8-803.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

ARTICLE 3

COVENANTS AND WARRANTIES

44-5-59. Covenant running with the land between property owner and third party.

Except as provided in Code Section 44-5-60 and excluding covenants recorded on property solely by the property's owner, which shall run with the title to the land, a covenant runs with the land when, for consideration and as reflected in a duly recorded instrument found in the applicable chain of title, a property owner and a third party agree to such covenant, the property is adequately described in such covenant, and such covenant does not run for more than 20 years. (Code 1981, § 44-5-59, enacted by Ga. L. 2013, p. 776, § 1/HB 175.)

Effective date. — This Code section became effective July 1, 2013. See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 776, § 2/HB 175, not codified by the General Assembly, provides that this Code section shall apply to covenants recorded on or after July 1, 2013.

Law reviews. — For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

44-5-60. Covenants running with land; effect of zoning laws; covenants and scenic easements for use of public; renewal of certain covenants; costs.

(a) The purchaser of lands obtains with the title, whether conveyed to him at public or private sale, all the rights which any former owner of the land under whom he claims may have had by virtue of any covenants of warranty of title, of quiet enjoyment, or of freedom from encumbrances contained in the conveyance from any former grantor unless the transmission of such covenants with the land is expressly prohibited in the covenant itself.

(b) Notwithstanding subsection (a) of this Code section, covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws nor in those areas in counties for which zoning laws have been adopted; provided, however, that whenever a zoning ordinance, upon its initial enactment by a county or municipality, expressly acknowledges the continuing application of a covenant restricting lands to certain uses within that jurisdic-

tion, any such covenant, if created prior to zoning laws being adopted by that county or municipality, shall continue to be effective in such jurisdiction until the expiration of such covenant in accordance with its terms.

(c) The limitation provided in subsection (b) of this Code section shall not apply with respect to any covenant or scenic easement in favor of or for the benefit of the United States or any department, bureau, or agency thereof; this state or any political subdivision thereof; or any corporation, trust, or other organization holding land for the use of the public, but only with respect to such covenants and scenic easements running in favor of or for the benefit of the land so held for the use of the public. Such covenants and scenic easements shall run in perpetuity.

(d)(1) Notwithstanding the limitation provided in subsection (b) of this Code section, covenants restricting lands to certain uses affecting planned subdivisions containing no fewer than 15 individual plots shall automatically be renewed beyond the period provided for in subsection (b) of this Code section unless terminated as provided in this subsection. Each such renewal shall be for an additional 20 year period, and there shall be no limit on the number of times such covenants shall be renewed.

(2) To terminate a covenant as provided in paragraph (1) of this subsection, at least 51 percent of the persons owning plots affected by such covenant shall execute a document containing a legal description of the entire area affected by the covenant, a list of the names of all record owners of plots affected by the covenant, and a description of the covenant to be terminated, which may be incorporated by reference to another recorded document. By signing such document, each such person shall verify that he or she is a record owner of property affected by the covenant. Such document shall be recorded in the office of the clerk of the superior court of the county where the land is located no sooner than but within two years prior to the expiration of the initial 20 year period or any subsequent 20 year period. The clerk of the superior court shall index the document under the name of each record owner appearing in the document.

(3) No covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin.

(4) Notwithstanding any other provision of this Code section or of any covenants with respect to the land, no change in the covenants which imposes a greater restriction on the use or development of the land will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made.

(e) To the extent provided in the covenants, the obligation for the payment of assessments and fees arising from covenants shall include

the costs of collection, including reasonable attorney's fees actually incurred. (Orig. Code 1863, § 2661; Code 1868, § 2660; Code 1873, § 2702; Code 1882, § 2702; Civil Code 1895, § 3612; Civil Code 1910, § 4192; Code 1933, § 29-301; Ga. L. 1935, p. 112, § 1; Ga. L. 1962, p. 540, § 1; Ga. L. 1971, p. 814, § 1; Ga. L. 1990, p. 384, § 1; Ga. L. 1991, p. 334, § 1; Ga. L. 1993, p. 782, § 1; Ga. L. 2008, p. 1135, § 2A/HB 422; Ga. L. 2012, p. 692, § 2/HB 728.)

The 2012 amendment, effective July 1, 2012, added the proviso at the end of subsection (b).

Law reviews. — For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

Cross references. — Georgia Property Owners' Association Act, §§ 44-3-220 and 44-3-234.

Editor's notes. — Ga. L. 2012, p. 692, § 1/HB 728, not codified by the General Assembly, provides that: "The General Assembly finds that current law, Code Section 44-5-60, relating to covenants running with the land, is vague and is in fact silent as to the treatment of covenants which were created prior to a county or municipality adopting zoning laws. The General Assembly finds that during its 1935 session it provided for covenants running with the land terminating at a point certain when municipalities had adopted zoning laws and that in its 1962 session it further provided for covenants running with the land terminating at a point certain in those areas of counties for which zoning laws had been adopted. However, the General Assembly finds that at no point has this body pronounced how covenants running with the land which were created prior to the existence of zoning laws should be treated, and therefore it is the intent of the General Assembly to clarify and correct the current vagaries in the law."

JUDICIAL DECISIONS

Analysis

Covenants Running with Land

3. Enlargement

Homeowners not bound by change to association covenants. — In a HOA's action against homeowners for violation of a garage storage covenant, in which it was determined that the owners were not bound by the covenant under O.C.G.A. § 44-5-60(d)(4) or O.C.G.A. § 44-2-226(a), and the HOA dismissed the HOA's remaining claim, the owners were the prevailing party entitled to attorney fees under the declaration; however, the trial court did not err in denying attorney fees under O.C.G.A. § 9-15-14(b). Marino v. Clary Lakes Homeowners Ass'n, 331 Ga. App. 204, 770 S.E.2d 289 (2015).

4. Procedure

Expiration of covenants.

In an agreement by a private water company to provide water to the homes built in a subdivision, because the agreement constituted a restrictive covenant limiting each lot owner's options for obtaining water necessary for the use and enjoyment of his or her property, the terms of the agreement ceased to be enforceable in 2011 as the agreement expired after 20 years when the homeowners failed to renew the covenant as required by a former provision of this statute. Double Branches Ass'n v. Jones,

Covenants Running with Land (Cont'd)
4. Procedure (Cont'd)

331 Ga. App. 159, 770 S.E.2d 252 (2015).

5. Illustrative Cases

Expiration of 20 year period by operation of law. — Provisions in an easement agreement constituted restrictive covenants because the provisions barred the owner from using any portion of the owners' approximately two-acre property, except for part on which the owners' current building was located, for anything other than a driveway, thoroughfare, or parking lot; those provisions had therefore expired by operation of law, 20 years after creation. Davista Holdings, LLC v. Capital Plaza, Inc., 321 Ga. App. 131, 741 S.E.2d 266 (2013).

ARTICLE 4

GIFTS GENERALLY

Law reviews. — For article, "The Renewed Significance of Title in Dividing Marital Assets," see 16 (No. 6) Ga. St. B.J. 24 (2011).

PART 1

INTER VIVOS GIFTS

Law reviews. — For article, "The Renewed Significance of Title in Dividing Marital Assets," see 16 (No. 6) Ga. St. B.J. 24 (2011).

44-5-80. Criteria for making valid inter vivos gift.

Law reviews. — For article, "The Renewed Significance of Title in Dividing Marital Assets," see 16 (No. 6) Ga. St. B.J. 24 (2011). For annual survey on wills, trusts, guardianships, and fiduciary administration, see 64 Mercer L. Rev. 325 (2012).

JUDICIAL DECISIONS

ANALYSIS

DELIVERY

Delivery

Deposit in safe deposit box insufficient delivery.

Although a niece was a joint tenant with a decedent on the lease of a safe deposit box, there was no evidence that an inter vivos gift of the contents of the box was made to the niece under O.C.G.A. § 44-5-80 since the decedent retained access to the box, and the contents were subject to being reclaimed by the decedent at any time prior to the decedent's death. Furthermore, there was no evidence that full control or power over the property vested in the niece before the decedent's death or that the decedent renunciated dominion and transferred the property to the niece. Longstreet v. Decker, 312 Ga. App. 1, 717 S.E.2d 513 (2011).

44-5-87. Implied trust on failure of specific purpose for which gift made.

JUDICIAL DECISIONS

No failure to use for designated purpose.

"Best interest of creditors" test under 11 U.S.C. § 1325(a)(4) was not met by the proposed plan of Chapter 13 debtors because the plan did not account for the recoverable value of the debtor's transfer of the debtor's interest in property given to the debtor by the debtor's mother. An implied trust under O.C.G.A. § 44-5-87 did not exist when the specific purpose of the mother's gift was to transfer the property to her sons outside of probate while continuing to reside in the house, and that purpose was accomplished. Meredith v. Weigl (In re Weigl), No. 10-60341, 2011 Bankr. LEXIS 2246 (Bankr. S.D. Ga. Jan. 18, 2011).

ARTICLE 7

PRESCRIPTION

44-5-160. Nature of title by prescription.

JUDICIAL DECISIONS

Exclusivity not shown. — In a quiet title action, there was evidence to support the jury's finding that the claimant did not satisfy the elements of adverse possession under O.C.G.A. § 44-5-160 et seq., since the evidence showed that the claimant did not hold the property exclusively as the owner had given permission to others to hunt on the land. Keever v. Dellinger, 291 Ga. 860, 734 S.E.2d 874 (2012).

44-5-161. Adverse possession; effect of permissive possession.

JUDICIAL DECISIONS

Analysis

General Consideration

Judicial review. — Trial court did not err in rejecting a property owners' claim of title to a street by adverse possession; because the owners did not provide a transcript of the special master's evidentiary hearing, it was presumed that the evidence supported the relevant findings of the special master adopted by the trial court. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229 (2012).

Requirements

Notice required.

Facts as set out by the trial court and as recited by the brothers were insufficient as a matter of law to establish that the brothers were in such notorious possession that the brothers acquired title to the riverbed by prescriptive easement or adverse possession; all of the brothers' actions were consistent with the brothers' 1976 easement, and therefore did not give

Requirements (Cont'd)

notice that the brothers claimed the entire riverbed to the exclusion of others. Thomas v. Henry County Water & Sewerage Auth., 317 Ga. App. 258, 731 S.E.2d 66 (2012).

Requirements satisfied.

Trial court did not err in granting summary judgment in favor of the appellees granting the appellees prescriptive title by adverse possession to the disputed property because the terraces and construction debris remained in the same place continuously for the statutory 20-year prescriptive period; the building of the terraces changed the nature and appearance of the property and gave notice to all that the appellees were exercising possession over the property in question; the construction of the terraces demonstrated the appellees' exercise of exclusive dominion over the property and an appropriation of the property for the appellees' own use and benefit; and the construction of the terraces established a claim of right to the property. Kelley v. Randolph, 295 Ga. 721, 763 S.E.2d 858 (2014).

Requirements not satisfied.

Trial court did not err in denying a landowner's claim that the landowner held prescriptive title to certain property by possession for a period of more than 20 years under O.C.G.A. § 44-5-163 because neither the landowner nor the landowner's spouse cultivated the property or erected any structure or fence upon the property pursuant to O.C.G.A. § 44-5-165, and the clearing of vegetation did not require a finding that possession had been established; photographs submitted in support of the landowner's claim that a pre-existing fence situated at one end of the property, together with the vegetation lines caused by the clearing and periodic mowing of the property, constituted an enclosure of the property so as to evidence possession and could allow the special master to conclude that the asserted enclosure was not so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Trial court erred in finding that a neighbor was the rightful owner of certain property because there was no evidence to support the conclusion that the neighbor owned the disputed property either by deed or by adverse possession; the legal description of the property contained in the neighbor's deed did not include the disputed property, and since the evidence showed that, at most, the neighbor made a claim to the disputed property for only eighteen years before being challenged by the landowners, the neighbor's claim to have gained prescriptive title to the property through adverse possession under O.C.G.A. §§ 44-5-161 and 44-5-165 failed as a matter of law. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

Trial court did not err in granting a bank and purchasers summary judgment in a son's action to quiet title to a parcel of land because the son did not gain title to the house on the property through adverse possession; the son had not adversely possessed the property for the requisite 20 years pursuant to O.C.G.A. § 44-5-161 et seq. Furthermore, the son could not claim adverse possession under color of title, which reduced the required period of possession to seven years, because the son's deed did not provide written evidence of title. Haffner v. Davis, 290 Ga. 753, 725 S.E.2d 286 (2012).

Public, Continuous, Exclusive, Uninterrupted, and Peaceable

Installation of sprinkler system. — Property owners could not establish that the alleged installation of a sprinkler system on the disputed property by a prior owner of the owners' property somehow bolstered the owners' claim of adverse possession because there was no evidence as to how long any previous owner allegedly maintained adverse possession of the disputed property, and the installation of a sprinkler system, by itself, would not establish adverse possession under the circumstances presented in the case. Campbell v. Landings Ass'n, 289 Ga. 617, 713 S.E.2d 860 (2011).

Reconstruction of dam and pond. — In a boundary dispute, the evidence was sufficient for the jury to find that a landowner was entitled to judgment pursuant

to prescriptive title under O.C.G.A. § 44-5-161(a) because a dam creating the disputed pond broke in 1994, and the landowner reconstructed the dam at the landowner's sole cost; the neighbors raised no objection to this act of actual possession and ownership. Mathews v. Cloud, 294 Ga. 415, 754 S.E.2d 70 (2014).

Evidence supporting claim of adverse possession.

Trial court properly granted summary judgment to a neighbor in its declaratory judgment suit as the neighbor had established its right to use the airspace through acquisition by adverse possession under O.C.G.A. § 44-5-161(a). For a period of more than 20 years, the neighbor's possession of the airspace occupied by its ventilation system had been public, continuous, exclusive, uninterrupted, peaceable, and under a claim of right, and contrary to the owner's contention, it was the owner's burden, not the neighbor's, to rebut the presumption of adverse possession with evidence of permissive use, which the owner had not done. Cong. St. Props., LLC v. Garibaldi's, Inc., 314 Ga. App. 143, 723 S.E.2d 463 (2012).

Evidence insufficient to support claim of adverse title.

Trial court did not err in finding that property owners' claim for prescriptive title failed as a matter of law because the owners did not show that the owners use of the property had been continuous, exclusive, uninterrupted, and peaceable for the past twenty years; the owners purchased the owners' lot within the past sixteen years, and a homeowners association had consistently impeded all of the owners' attempts to do the owners' own personal construction projects on the disputed property. Campbell v. Landings Ass'n, 289 Ga. 617, 713 S.E.2d 860 (2011).

Evidence supported the trial court's conclusion that landowners did not own the disputed property because the landowners' occasional maintenance and use of the disputed property did not amount to the type of exclusive possession for twenty years that would support a claim for prescriptive title under O.C.G.A. §§ 44-5-161 and 44-5-165. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

Claim of Right

Easement rights extinguished. — Trial court did not err in granting summary judgment in favor of the appellees on the appellants' abatement claim in which the appellants sought the removal of the terraces and construction debris from the alleyway because, even assuming the appellants previously held title to one-half of the alleyway, ownership of that portion of the alleyway now lay with the appellees based on the appellees acquisition of the disputed property by prescriptive title and any rights the appellants had to the property, including any asserted easement rights, were extinguished. Kelley v. Randolph, 295 Ga. 721, 763 S.E.2d 858 (2014).

Permissive Possession

Permissive possession cannot be foundation of prescription, etc.

Trial court's finding of "permissive use" of property held by a local church, even when that use spanned 70 years, could not be the foundation of a prescription until an adverse claim and actual notice to the other party under O.C.G.A. § 44-5-161(b) because there was no evidence presented that an adverse claim was made and actual notice was given; therefore, the local church did not hold prescriptive title in trust for a national church, but the local church obtained the property by gift years ago and took possession and built the church building. Kemp v. Neal, 288 Ga. 324, 704 S.E.2d 175 (2010).

Burden of proof. — O.C.G.A. § 44-5-161(b) does not place the burden on the party claiming adverse possession to prove that its use of the airspace was not permissive as part of its prima facie case; rather, in accordance with the plain language of the statute and applicable Georgia law, the party claiming adverse possession satisfies its burden once it establishes by a preponderance of the evidence each of the elements explicitly set forth within § 44-5-161(a). Once it does so, the burden then shifts to the opposing party to rebut the presumption of adverse possession with evidence of permissive use. Cong. St. Props., LLC v. Garibaldi's, Inc., 314 Ga. App. 143, 723 S.E.2d 463 (2012).

44-5-163. When adverse possession for 20 years confers title.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Judicial review. — Trial court did not err in rejecting a property owners' claim of title to a street by adverse possession; because the owners did not provide a transcript of the special master's evidentiary hearing, it was presumed that the evidence supported the relevant findings of the special master adopted by the trial court. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229 (2012).

Cited in Small v. Irving, 291 Ga. 316, 729 S.E.2d 323 (2012).

Requirements

An easement may be acquired by prescription, etc.

Trial court did not err in granting summary judgment in favor of the appellees on the appellants' abatement claim in which the appellants sought the removal of the terraces and construction debris from the alleyway because, even assuming the appellants previously held title to one-half of the alleyway, ownership of that portion of the alleyway now lay with the appellees based on the appellees acquisition of the disputed property by prescriptive title and any rights the appellants had to the property, including any asserted easement rights, were extinguished. Kelley v. Randolph, 295 Ga. 721, 763 S.E.2d 858 (2014).

Possession relied upon must meet requirements of O.C.G.A. § 44-5-161.

Trial court properly granted summary judgment to a neighbor in its declaratory judgment suit as the neighbor had established its right to use the airspace through acquisition by adverse possession under O.C.G.A. § 44-5-161(a). For a period of more than 20 years, the neighbor's possession of the airspace occupied by its ventilation system had been public, continuous, exclusive, uninterrupted, peaceable, and under a claim of right, and contrary to the owner's contention, it was the owner's burden, not the neighbor's, to rebut the presumption of adverse possession with evidence of permissive use, which the owner had not done. Cong. St. Props., LLC v. Garibaldi's, Inc., 314 Ga. App. 143, 723 S.E.2d 463 (2012).

Trial court did not err in granting summary judgment in favor of the appellees granting the appellees prescriptive title by adverse possession to the disputed property because the terraces and construction debris had remained in the same place continuously for the statutory 20-year prescriptive period; the building of the terraces changed the nature and appearance of the property and gave notice to all that the appellees were exercising possession over the property in question; the construction of the terraces demonstrated the appellees' exercise of exclusive dominion over the property and an appropriation of the property for the appellees own use and benefit; and the construction of the terraces established a claim of right to the property. Kelley v. Randolph, 295 Ga. 721, 763 S.E.2d 858 (2014).

Evidence insufficient for title.

Trial court did not err in denying a landowner's claim that the landowner held prescriptive title to certain property by possession for a period of more than 20 years under O.C.G.A. § 44-5-163 because neither the landowner nor the landowner's spouse cultivated the property or erected any structure or fence upon the land pursuant to O.C.G.A. § 44-5-165, and the clearing of vegetation did not require a finding that possession had been established; photographs submitted in support of the landowner's claim that a pre-existing fence situated at one end of the property, together with the vegetation lines caused by the clearing and periodic

mowing of the property, constituted an enclosure of the property so as to evidence possession could allow the special master to conclude that the asserted enclosure was not so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Trial court did not err in granting a bank and purchasers summary judgment in a son's action to quiet title to a parcel of land because the son did not gain title to the house on the property through adverse possession; the son had not adversely possessed the property for the requisite 20 years pursuant to O.C.G.A. § 44-5-161 et seq. Furthermore, the son could not claim adverse possession under color of title, which reduced the required period of possession to seven years because the son's deed did not provide written evidence of title. Haffner v. Davis, 290 Ga. 753, 725 S.E.2d 286 (2012).

44-5-164. When adverse possession for seven years confers title.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Campbell v. Landings Ass'n, 289 Ga. 617, 713 S.E.2d 860 (2011).

Adverse Possession

2. Acts Creating Prescriptive Title

Reconstruction of dam and pond. — Ample evidence was presented of a landowner family's actual or constructive possession of the entirety of the property described in their deed, including their entry on the land to construct a dam and pond visible to their neighbors, well in excess of the seven-year time period required to establish prescriptive title by adverse possession pursuant to O.C.G.A. § 44-5-164. Mathews v. Cloud, 294 Ga. 415, 754 S.E.2d 70 (2014).

Color of Title

4. Insufficient Instruments

No color of title absent sufficient identification of property.

O.C.G.A. § 44-5-164 did not apply because a deed did not describe the subject property, and thus could not serve as color of title to the property. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

44-5-165. How actual possession of lands evidenced.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Scope of prescription by mere possession.

Facts as set out by the trial court and as recited by the brothers were insufficient as a matter of law to establish that the brothers were in such notorious possession that the brothers acquired title to the riverbed by prescriptive easement or adverse possession; all of the brothers' actions were consistent with their 1976 easement, and therefore did not give notice that claimed the entire riverbed to the exclusion of others. Thomas v. Henry County Water & Sewerage Auth., 317 Ga. App. 258, 731 S.E.2d 66 (2012).

Actual Possession

1. In General

Installation of sprinkler system insufficient. — Property owners could not establish that the alleged installation of a sprinkler system on the disputed property by a prior owner of the owners' property somehow bolstered the owners' claim of adverse possession because there was no evidence as to how long any previous owner allegedly maintained adverse possession of the disputed property, and the installation of a sprinkler system, by itself, would not establish adverse possession under the circumstances presented in the case. Campbell v. Landings Ass'n, 289 Ga. 617, 713 S.E.2d 860 (2011).

Occasional mowing and clearing of vegetation insufficient. — Trial court did not err in denying a landowner's claim that the landowner held prescriptive title to certain property by possession for a period of more than 20 years under O.C.G.A. § 44-5-163 because neither the landowner nor the landowner's spouse cultivated the property or erected any structure or fence upon the property pursuant to O.C.G.A. § 44-5-165, and the clearing of vegetation did not require a finding that possession had been established; photographs submitted in support of the landowner's claim that a pre-existing fence situated at one end of the property, together with the vegetation lines caused by the clearing and periodic mowing of the property, constituted an enclosure of the property so as to evidence possession and could allow the special master to conclude that the asserted enclosure was not so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Occasional maintenance and use did not amount to exclusive possession. — Evidence supported the trial court's conclusion that the landowners did not own the disputed property because the landowners' occasional maintenance and use of the disputed property did not amount to the type of exclusive possession for twenty years that would support a claim for prescriptive title under O.C.G.A. §§ 44-5-161 and 44-5-165. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

Building of pond and dam sufficient. — In a boundary dispute, the evidence was sufficient for the jury to find that a landowner was entitled to judgment pursuant to prescriptive title under O.C.G.A. § 44-5-161(a) because a dam creating the disputed pond broke in 1994, and the landowner reconstructed the dam at the landowner's sole cost; the neighbors raised no objection to this act of actual possession and ownership. These acts extended to the property line set forth in the landowner's deed even though some of the disputed land was not enclosed or cultivated. Mathews v. Cloud, 294 Ga. 415, 754 S.E.2d 70 (2014).

Claim of prescriptive title to property failed. — Trial court erred in finding that a neighbor was the rightful owner of certain property because there was no evidence to support the conclusion that the neighbor owned the disputed property either by deed or by adverse possession; the legal description of the property contained in the neighbor's deed did not include the disputed property, and since the evidence showed that, at most, the neighbor made a claim to the disputed property for only eighteen years before being challenged by the landowners, the neighbor's claim to have gained prescriptive title to the property through adverse possession under O.C.G.A. §§ 44-5-161 and 44-5-165 failed as a matter of law. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

44-5-166. Constructive possession of lands; effect of constructive possession of same land by adjacent owners.

JUDICIAL DECISIONS

ANALYSIS

ADJACENT OWNERS

Adjacent Owners

Party having clear title prevailed over party with vague deed. — In a boundary dispute, constructive possession of the entirety of the tract described in a landowner's title was not defeated by O.C.G.A. § 44-5-166(b) because the deed by which the adjoining owner's heirs claimed title to the disputed land was vague and set forth no measured boundaries with respect to the property line; thus, the evidence did not establish they also constructively possessed the disputed land by virtue of their title. Mathews v. Cloud, 294 Ga. 415, 754 S.E.2d 70 (2014).

44-5-167. Extent of constructive possession under deed; judicial notice.

JUDICIAL DECISIONS

Assertion of dominion over pond extended to uncultivated contiguous land. — In a boundary dispute, the evidence was sufficient for the jury to find that a landowner was entitled to judgment pursuant to prescriptive title under O.C.G.A. § 44-5-161(a) because a dam creating the disputed pond broke in 1994, and the landowner reconstructed the dam at the landowner's sole cost; the neighbors raised no objection to this act of actual possession and ownership. These acts extended to the property line set forth in the landowner's deed even though some of the disputed land was not enclosed or cultivated. Mathews v. Cloud, 294 Ga. 415, 754 S.E.2d 70 (2014).

44-5-168. Adverse possession of mineral rights under certain conditions; procedure to obtain title.

JUDICIAL DECISIONS

Mineral owner must show work or payment of ad valorem taxes.

Because the owner actually paid ad valorem taxes on all the mineral rights reserved on the property owned by a ranch, under the clear language of the Mineral Lapse Statute, O.C.G.A. § 44-5-168, the ranch could not prevail on the ranch's adverse possession claim and the owner was entitled to summary judgment. Cartersville Ranch, LLC v. Dellinger, 295 Ga. 195, 758 S.E.2d 781 (2014).

44-5-169. Possession of land as notice; presumption from possession of husband and wife.

JUDICIAL DECISIONS

ANALYSIS

POSSESSION OF LAND AS NOTICE
6. ILLUSTRATIVE CASES

Possession of Land as Notice

6. Illustrative Cases

Failure to probate a will meant notice lacking. — Trial court did not err in granting a bank's motion for summary judgment in the bank's quiet title action against a testator's niece and great-niece on the ground that under O.C.G.A. § 44-2-4(a), the priority of a security deed the testator's stepson gave to a mortgage company, which assigned its interest in the property to the bank, was protected from the interests the niece and great-niece held that were grounded in the testator's unrecorded will because there was nothing in the record that would render O.C.G.A. § 44-2-4(a) inapplicable since the notice created by the possession of the niece and great-niece was only constructive notice, and there was no evidence that the company had any actual notice of the will or of the interests created thereby; the statute applies equally to give protection to those who take an interest in realty when there are other interests that exist, but are not of record, because of a failure to probate a will. Riggins v. Deutsche Bank Nat'l Trust Co., 288 Ga. 850, 708 S.E.2d 266 (2011).

44-5-170. Effect of disabilities on commencement of prescription.

Prescription shall not run against the rights of a minor during his or her minority, a person incompetent by reason of mental illness or intellectual disability so long as the mental illness or intellectual disability lasts, or a person imprisoned during his or her imprisonment. After any such disability is removed, prescription shall run against the person holding a claim to realty or personalty. (Laws 1767, Cobb's 1851 Digest, p. 559; Ga. L. 1855-56, p. 233, § 19; Code 1863, § 2645; Code 1868, § 2644; Code 1873, § 2686; Code 1882, § 2686; Civil Code 1895, § 3593; Civil Code 1910, § 4173; Code 1933, § 85-411; Ga. L. 2015, p. 385, § 4-9/HB 252.)

The 2015 amendment, effective July 1, 2015, in the first sentence, inserted "or her" twice, substituted "intellectual disability so" for "retardation as", and substituted "intellectual disability" for "retardation".

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

ARTICLE 10

DEDICATION

44-5-230. Dedication of lands to public use.

JUDICIAL DECISIONS

Analysis

Requirements for Dedication

3. Acceptance

Deed recitals concerning a cemetery. — Trial court did not err in finding an implied dedication of a cemetery for public use because, given the deeds among family members which excepted the cemetery, the neighboring residents and family members were estopped to deny by the deed recitals that there had been no dedication of the cemetery, and the cemetery had been in existence for more than 40 years before the family acquired the property which surrounded the cemetery. Thus, having been dedicated, any authority over the cemetery which the neighboring residents and family members might have had as owners was lost. Brannon v. Perryman Cemetery, Ltd., 308 Ga. App. 832, 709 S.E.2d 33 (2011).

CHAPTER 6

ESTATES

Article 7

Tenancy in Common

PART 2

PARTITION

Subpart 2

Statutory Partition

Sec.

Subpart 3

Uniform Partition of Heirs Property

Article 8

Joint Tenancy with Survivorship

Law reviews. — For article, "A Primer on Heirs Property and Georgia's New Uniform Partition of Heirs Property Act: Protecting Owners of Heirs Property," see 19 G. St. B.J. 16 (Oct. 2013).

ARTICLE 1

IN GENERAL

44-6-2. Merger of lesser estate into greater.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Legacy Cmtys. Group, Inc. v. Branch Banking & Trust Co., 310 Ga. App. 466, 713 S.E.2d 670 (2011), aff'd in part, rev'd in part, 290 Ga. 724, 723 S.E.2d 674; vacated in part, 316 Ga. App. 496, 729 S.E.2d 612 (2012).

ARTICLE 2

FEE SIMPLE ESTATES

44-6-21. Words necessary to create absolute estate; preference for construing as conveyance; maker's intention controls; parol evidence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
RULES OF CONSTRUCTION

General Consideration

Deed conveyed life estate and then an estate in remainder. — Trial court erred in declaring that a deed conveyed a joint tenancy to a decedent and widow because the trial court construed the deed in a manner contrary to the deed's terms, ignoring the provision granting the decedent's widow a tenancy in common for their joint lives; instead, the deed should have been construed to convey first a life estate and then an estate in remainder so as to give effect to all of the deed's provisions. Greene v. Greene, 311 Ga. App. 132, 714 S.E.2d 650 (2011).

Rules of Construction

Parol evidence not admissible to show intent that security interest be perpetual. — Use of the words "forever, in fee simple" in a security deed were not an "affirmative statement" within the meaning of O.C.G.A. § 44-14-80(a)(2) such that title to the property did not revert to the grantor for 20 years, rather than seven years, because those words related to the estate granted rather than the duration of the security interest. Parol evidence was not admissible and § 44-14-80 controlled over O.C.G.A. § 44-6-21. Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

ARTICLE 3

ESTATES GRANTED UPON CONDITIONS

44-6-41. Conditions precedent and subsequent distinguished; preferred construction and remedy.

JUDICIAL DECISIONS

ANALYSIS

CONDITIONS PRECEDENT

Conditions Precedent

Stipulation providing for payment before entry to cut timber.

Under Georgia law, conditions precedent were disfavored and a contractual provision was interpreted as a condition precedent only if it is clear that the parties intended it to operate that way; because the program agreements did not indicate that the parties intended the monthly billing requirement to be a condition precedent to the company's reimbursement obligation, the court would not treat it as one. Williams Serv. Group v. Nat'l Union Fire Ins. Co., No. 11-14999, 2012 U.S. App. LEXIS 22004 (11th Cir. Oct. 23, 2012) (Unpublished).

ARTICLE 4

REMAINDERS AND REVERSIONS

44-6-60. Nature of estates in remainder and in reversion; rights of reversioner.

JUDICIAL DECISIONS

ANALYSIS

ESTATES IN REMAINDER

Estates in Remainder

Deed conveyed life estate and an estate in remainder. — Trial court erred in declaring that a deed conveyed a joint tenancy to a decedent and widow because the trial court construed the deed in a manner contrary to the deed's terms, ignoring the provision granting the decedent's widow a tenancy in common for their joint lives; instead, the deed should have been construed to convey first a life estate and then an estate in remainder, so as to give effect to all of the deed's provisions. Greene v. Greene, 311 Ga. App. 132, 714 S.E.2d 650 (2011).

Deed conveyed to a widow a fee simple

Estates in Remainder (Cont'd)

estate in the property upon a decedent's death because the deed conveyed to the decedent and widow a life estate in the property as tenants in common, which terminated upon the death of either of them, and the language of the deed conveyed a fee simple estate in remainder to the surviving grantee; therefore, upon the decedent's death, the life estate of the decedent and widow in the property ended and fee simple title to the property vested in the widow. Greene v. Greene, 311 Ga. App. 132, 714 S.E.2d 650 (2011).

44-6-61. Vested and contingent remainders distinguished.

JUDICIAL DECISIONS

ANALYSIS

Vested Remainders

2. Illustrative Cases

Vested remainder found.
Trial court erred in the court's construction of a deed because the deed was clear as written and, as such, the heir received a one-third undivided interest in the property, and the executor individually and the estate each received a one-third undivided interest as the vested remaindermen who each received an interest in the property under O.C.G.A. § 44-6-66. Wilkes v. Fraser, 324 Ga. App. 642, 751 S.E.2d 455 (2013).

44-6-65. Creation of remainder for persons not in being; vested remainder subject to open.

JUDICIAL DECISIONS

Vested remainder found. — Trial court erred in the court's construction of a deed because the deed was clear as written and, as such, the heir received a one-third undivided interest in the property, and the executor individually and the estate each received a one-third undivided interest as the vested remaindermen who each received an interest in the property under O.C.G.A. § 44-6-66. Wilkes v. Fraser, 324 Ga. App. 642, 751 S.E.2d 455 (2013).

44-6-66. Preference for vested remainders; construction of words of survivorship in wills.

JUDICIAL DECISIONS

ANALYSIS

Illustrative Cases

Vested remainder found.
Trial court properly determined that a younger brother was entitled to all of the proceeds of a trust because the other siblings had previously unequivocally waived any interest in the trust assets and the younger brother was the sole surviving child who had not waived any interest in

the trust. White v. Call, 292 Ga. 565, 738 S.E.2d 617 (2013).

Trial court erred in the court's construction of a deed because the deed was clear as written and, as such, the heir received a one-third undivided interest in the property, and the executor individually and the estate each received a one-third undivided interest as the vested remaindermen who each received an interest in the property under O.C.G.A. § 44-6-66. Wilkes v. Fraser, 324 Ga. App. 642, 751 S.E.2d 455 (2013).

ARTICLE 5

LIFE ESTATES

44-6-80. Nature of life estates; estates during widowhood.

JUDICIAL DECISIONS

Deed conveyed life estate and an estate in remainder. — Deed conveyed to a widow a fee simple estate in the property upon a decedent's death because the deed conveyed to the decedent and widow a life estate in the property as tenants in common, which terminated upon the death of either of them, and the language of the deed conveyed a fee simple estate in remainder to the surviving grantee; therefore, upon the decedent's death, the life estate of the decedent and widow in the property ended and fee simple title to the property vested in the widow. Greene v. Greene, 311 Ga. App. 132, 714 S.E.2d 650 (2011).

Trial court erred in declaring that a deed conveyed a joint tenancy to a decedent and widow because the trial court construed the deed in a manner contrary to the deed's terms, ignoring the provision granting the decedent's widow a tenancy in common for their joint lives; instead, the deed should have been construed to convey first a life estate and then an estate in remainder so as to give effect to all of the deed's provisions. Greene v. Greene, 311 Ga. App. 132, 714 S.E.2d 650 (2011).

44-6-81. Length of life estate.

JUDICIAL DECISIONS

Deed conveyed life estate and an estate in remainder. — Deed conveyed to a widow a fee simple estate in the property upon a decedent's death because the deed conveyed to the decedent and widow a life estate in the property as tenants in common, which terminated upon the death of either of them, and the language of the deed conveyed a fee simple estate in remainder to the surviving grantee; therefore, upon the decedent's death, the life estate of the decedent and widow in the property ended and fee simple title to the property vested in the widow. Greene v. Greene, 311 Ga. App. 132, 714 S.E.2d 650 (2011).

Cited in Vineville Capital Group, LLC v. McCook, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

ARTICLE 7

TENANCY IN COMMON

PART 1

IN GENERAL

44-6-120. "Tenancy in common" defined; presumption of equality of shares; effect of inequality of shares on right of possession.

JUDICIAL DECISIONS

Tenant in common free to convey interest in property. — Mortgage company's security interest in certain property extended at least to a one-half undivided interest in the property because an ex-husband acquired the property as tenants in common under a warranty deed transferring the property to him and his ex-wife as grantees; therefore, the security deed under which the ex-wife purported to convey legal title to the entire property to the company, at a minimum, effectively vested the company with a security interest in the one-half undivided interest in the property the ex-wife indisputably held and was free to convey. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

44-6-123. Adverse possession against cotenant; action to recover possession.

JUDICIAL DECISIONS

ANALYSIS

WHAT CONSTITUTES OUSTER

What Constitutes Ouster

Evidence sufficient to support ouster. — Evidence was sufficient to enable the jury to conclude that a property owner met the burden of showing ouster because the owner and an uncle did more than simply make improvements and pay property taxes; the owner and uncle took unequivocal steps, including renting a part of the premises to different people and cutting and selling timber, which were inconsistent with, and exclusive of, the rights of the cotenants not in possession, and those acts were open and public. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697 (2012).

PART 2

PARTITION

Subpart 1

Equitable Partition

44-6-140. When equitable partition authorized.

JUDICIAL DECISIONS

ANALYSIS

DISTINCTION BETWEEN EQUITY AND LAW

Distinction Between Equity and Law

Statutory partition more appropriate. — Trial court erred by ordering the equitable partition sale of 3.503 acres of real property because the co-owner failed to show that the remedy at law of a statutory partition, pursuant to O.C.G.A. § 44-6-160 et seq., was insufficient or that peculiar circumstances rendered the equitable proceeding more suitable and just; and, in a statutory partition, a court may order the sale of property that cannot be fairly divided by metes and bounds. Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

Subpart 2

Statutory Partition

44-6-160. Grounds for partition; jurisdiction; contents of petition.

Law reviews. — For article, "A Primer on Heirs Property and Georgia's New Uniform Partition of Heirs Property Act: Protecting Owners of Heirs Property," see 19 G. St. B.J. 16 (Oct. 2013).

JUDICIAL DECISIONS

ANALYSIS

DISTINCTION BETWEEN LAW AND EQUITY
PROCEDURE

Distinction Between Law and Equity

Statutory partition more appropriate. — Trial court erred by ordering the equitable partition sale of 3.503 acres of real property because the co-owner failed to show that the remedy at law of a statutory partition, pursuant to O.C.G.A. § 44-6-160 et seq., was insufficient or that peculiar circumstances rendered the equitable proceeding more suitable and just; and, in a statutory partition, a court may order the sale of property that cannot be fairly divided by metes and bounds. Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

Procedure

Sale can be ordered in a statutory partition for property that cannot be divided fairly by metes and bounds. — In a statutory partition, a court may order the sale of property that cannot be fairly divided by metes and bounds. Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

Motion to set aside filed more than three years after entry of partition judgment. — Trial court did not err when the court denied a mother's motion to set aside a judgment of partition because the motion to set aside was filed more than three years after the entry of the judgment of partition, and that judgment was made by a court with jurisdiction; the trial court had subject-matter jurisdiction to enter the partitioning judgment since the land sought to be partitioned was partially located in the county of the trial court, and that court had personal jurisdiction of the mother since, under the partitioning statutes, the notice of intent to seek partitioning was the only process necessary to bring a defendant into court to meet the application for partitioning. Cabrel v. Lum, 289 Ga. 233, 710 S.E.2d 810 (2011).

44-6-161. Who may apply for partition.

If the party desiring the writ of partition is of full age and free from disability, he or she may make the application either in person or by his or her agent or attorney in fact or at law. An application may be made for the benefit of a minor, a mentally ill or intellectually disabled person, or the beneficiary of a trust by the guardian of such minor, the guardian of such mentally ill or intellectually disabled person, or the trustee of such beneficiary, as the case may be. (Orig. Code 1863, § 3897; Code 1868, § 3921; Code 1873, § 3997; Code 1882, § 3997; Civil Code 1895, § 4787; Civil Code 1910, § 5359; Code 1933, § 85-1505; Ga. L. 2015, p. 385, § 4-10/HB 252.)

The 2015 amendment, effective July 1, 2015, in the first sentence, inserted "or she" and inserted "or her"; and substituted "intellectually disabled" for "retarded" twice in the second sentence.

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

44-6-162. Notice of intention to apply for writ of partition.

The party applying for the writ of partition shall give the other parties concerned at least 20 days' notice of his or her intention to make the application. If any of the other parties is a minor, a mentally ill or intellectually disabled person, or a beneficiary of a trust, the 20 days' notice shall be served on the guardian of such minor, the guardian of such mentally ill or intellectually disabled person, or the trustee of such beneficiary. If any of the parties reside outside of this state, the court may order service by publication as in its judgment is right in each case. (Laws 1767, Cobb's 1851 Digest, p. 582; Code 1863, § 3898; Code 1868, § 3922; Code 1873, § 3998; Code 1882, § 3998; Civil Code 1895, § 4788; Civil Code 1910, § 5360; Code 1933, § 85-1506; Ga. L. 1991, p. 94, § 44; Ga. L. 2015, p. 385, § 4-11/HB 252.)

The 2015 amendment, effective July 1, 2015, inserted "or her" in the first sentence and substituted "intellectually disabled" for "retarded" twice in the second sentence.

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

44-6-166.1. Partition when physical division of property is inequitable.

JUDICIAL DECISIONS

Sale can be ordered in a statutory partition for property that cannot be divided fairly by metes and bounds. — In a statutory partition, a court may order the sale of property that cannot be fairly divided by metes and bounds. Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

Statutory partition more appropriate. — Trial court erred by ordering the equitable partition sale of 3.503 acres of real property because the co-owner failed to show that the remedy at law of a statutory partition, pursuant to O.C.G.A. § 44-6-160 et seq., was insufficient or that peculiar circumstances rendered the equitable proceeding more suitable and just; and, in a statutory partition, a court may order the sale of property that cannot be fairly divided by metes and bounds. Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

44-6-167. When sale of lands ordered; procedure; place of sale; notice.

JUDICIAL DECISIONS

Statutory partition more appropriate. — Trial court erred by ordering the equitable partition sale of 3.503 acres of real property because the co-owner failed to show that the remedy at law of a statutory partition, pursuant to O.C.G.A. § 44-6-160 et seq., was insufficient or that peculiar circumstances rendered the equitable proceeding more suitable and just; and, in a statutory partition, a court may order the sale of property that cannot be fairly divided by metes and bounds. Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

Sale is subject to confirmation by the court.

Because all parties received proper notice of the partition action and, in fact, agreed to the entry of a final consent judgment of partition which gave rise to the trial court's authority to order the public sale, the trial court properly confirmed the sale of the property and directed the parties and parties in interest to execute the deeds. Jacobs v. Young, 291 Ga. 778, 732 S.E.2d 69 (2012).

44-6-170. Treatment of extraordinary cases; denial of sale or partition.

JUDICIAL DECISIONS

Statutory partition more appropriate. — Trial court erred by ordering the equitable partition sale of 3.503 acres of real property because the co-owner failed to show that the remedy at law of a statutory partition, pursuant to O.C.G.A. § 44-6-160 et seq., was insufficient or that peculiar circumstances rendered the equitable proceeding more suitable and just; and, in a statutory partition, a court may

order the sale of property that cannot be fairly divided by metes and bounds. Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).

44-6-171. Setting aside judgment by parties under disability, absent, or not notified; time limitations; conclusiveness of judgment; effect of proceedings on bona fide purchaser.

When proceedings have been instituted and judgment of the partition has been rendered according to the regulations prescribed in this part and if any one of the parties in interest is a minor or a mentally ill or intellectually disabled person who has no guardian, or is absent from the state during such proceeding, or has not been notified thereof, such minor or mentally ill or intellectually disabled person may, within 12 months after coming of age, after restoration of mind, or after having a guardian appointed, as the case may be, and such absent or unnotified party may, at any time within 12 months after rendition of the judgment, move the court to set aside the judgment on any of the grounds upon which a party notified and free from disabilities might have resisted the judgment upon the hearing as authorized by Code Section 44-6-165. The issue shall be tried and the subsequent proceedings shall be the same as is provided for in cases of objections filed to the return of the partitioners before judgment. If such motion to set aside the judgment is not made within the time specified in this Code section, such judgment shall be as binding and conclusive upon such minor, mentally ill or intellectually disabled person, or absent or unnotified party as if he or she had been notified, present, or free from disability. In no event shall such subsequent proceedings affect the title of a bona fide purchaser under a sale ordered by the court. (Laws 1767, Cobb's 1851 Digest, p. 582; Code 1863, § 3907; Code 1868, § 3931; Code 1873, § 4007; Code 1882, § 4007; Civil Code 1895, § 4797; Civil Code 1910, § 5369; Code 1933, § 85-1515; Ga. L. 2015, p. 385, § 4-12/HB 252.)

The 2015 amendment, effective July 1, 2015, substituted "intellectually disabled" for "retarded" three times in this Code section and inserted "or she" in the next to the last sentence.

Editor's notes. — Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

Subpart 3

Uniform Partition of Heirs Property

Effective date. — This subpart became effective January 1, 2013.

Editor's notes. — Ga. L. 2012, p. 97, § 1/HB 744, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Uniform Partition of Heirs Property Act.'"

44-6-180. Definitions.

As used in this subpart, the term:

(1) "Ascendant" means an individual who precedes another individual in lineage in a direct line of ascent from the other individual.

(2) "Broker" means any individual or entity issued a broker's real estate license by the Georgia Real Estate Commission pursuant to Chapter 40 of Title 43. Such term shall include the broker's affiliated licensees.

(3) "Collateral" means an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual's ascendant or descendant.

(4) "Descendant" means an individual who follows another individual in lineage in a direct line of descent from the other individual.

(5) "Heirs property" means real property held in tenancy in common which satisfies all of the following requirements on the date of the filing of a partition action:

(A) There is no agreement in a record binding all the cotenants which governs the partition of the property;

(B) One or more of the cotenants acquired title from a relative, whether living or deceased; and

(C) Any of the following applies:

(i) Twenty percent or more of the interests are held by cotenants who are relatives;

(ii) Twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) Twenty percent or more of the cotenants are relatives.

(6) "Partition by sale" means a court ordered sale of the entire heirs property, whether by public sale, sealed bids, or open-market sale conducted under Code Section 44-6-187.

(7) "Partition in kind" means the division of heirs property into physically distinct and separately titled parcels.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) "Relative" means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, mar-

riage, adoption, or law of this state other than this subpart. (Code 1981, § 44-6-180, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

Law reviews. — For article, "A Primer on Heirs Property and Georgia's New Uniform Partition of Heirs Property Act: Protecting Owners of Heirs Property," see 19 G. St. B.J. 16 (Oct. 2013).

44-6-181. Application; determination of heirs property.

(a) This subpart shall apply to partition actions filed on or after January 1, 2013.

(b) In an action to partition real property under Subpart 1 or 2 of this part, the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property shall be partitioned pursuant to this subpart unless all of the cotenants otherwise agree in a record. (Code 1981, § 44-6-181, enacted by Ga. L. 2012, p. 97, § 2/HB 744; Ga. L. 2013, p. 141, § 44/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised capitalization in the first sentence of subsection (b).

44-6-182. Posting notice sign on property.

If an order for service by publication of the summons for a writ of partition is granted and the court determines that the property may be heirs property, the plaintiff, not later than ten days after the court's determination that the property may be heirs property, shall post a sign in the right of way adjacent to the property which is the subject of the writ of partition, and the plaintiff shall maintain such sign while the action is pending. The sign shall state that a writ of partition has commenced, the name and address of the court in which the action is pending, and the common designation by which the property is known. The court may require the plaintiff to publish the name of the plaintiff and names of the known defendants on the sign. (Code 1981, § 44-6-182, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

44-6-183. Qualifications of partitioners.

If the court appoints partitioners as described in Code Section 44-6-163, each partitioner shall be a discreet person, disinterested, impartial, and not a party to or a participant in the writ of partition. (Code 1981, § 44-6-183, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

44-6-184. Appraisal of heirs property; other method to determine value; notice of value; required hearing.

(a) Except as otherwise provided in subsections (b) and (c) of this Code section, if the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (d) of this Code section.

(b) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.

(c) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

(d) If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this state to determine the fair market value of the property assuming sole ownership of the fee simple estate. Upon completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

(e) If an appraisal is conducted pursuant to subsection (d) of this Code section, not later than ten days after the appraisal is filed, the court shall send notice to each party with a known address, stating:

(1) The appraised fair market value of the property;

(2) That the appraisal is available at the clerk's office; and

(3) That a party may file with the court an objection to the appraisal not later than 30 days after the notice is sent, stating the grounds for the objection.

(f) If an appraisal is filed with the court pursuant to subsection (d) of this Code section, the court shall conduct a hearing to determine the fair market value of the property not sooner than 30 days after a copy of the notice of the appraisal is sent to each party under subsection (e) of this Code section, whether or not an objection to the appraisal is filed under paragraph (3) of subsection (e) of this Code section. In addition to the court ordered appraisal, the court may consider any other evidence of value offered by a party.

(g) After a hearing under subsection (f) of this Code section, but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value. (Code 1981, § 44-6-184, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

44-6-185. Partition by sale; purchase by party; buyouts; sale to others; notice and hearing.

(a) If any cotenant requests partition by sale, after the court determines the fair market value of the heirs property under Code Section 44-6-184 or accepts the evaluation of the property agreed to by all cotenants, the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale.

(b) Not later than 45 days after the notice is sent under subsection (a) of this Code section, any cotenant except a cotenant that requested partition by sale may give notice to the court that it elects to buy all the interests of the cotenants that requested partition by sale.

(c) The purchase price for each of the interests of a cotenant that requested partition by sale shall be the value of the entire parcel determined pursuant to Code Section 44-6-184 multiplied by the cotenant's fractional ownership of the entire parcel.

(d) After expiration of the period in subsection (b) of this Code section:

(1) If only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify all the parties of that fact;

(2) If more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant; or

(3) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and resolve the partition action under subsections (a) and (b) of Code Section 44-6-186.

(e) If the court sends notice to the parties under paragraphs (1) or (2) of subsection (d) of this Code section, the court shall set a date, not sooner than 60 days after the date the notice was sent, by which electing cotenants shall pay their apportioned price into the court. After this date:

(1) If all electing cotenants timely pay their apportioned price into court, the court shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them;

(2) If no electing cotenant timely pays its apportioned price, the court shall resolve the partition action under subsections (a) and (b) of Code Section 44-6-186 as if the interests of the cotenants that requested partition by sale were not purchased; or

(3) If one or more but not all of the electing cotenants fail to pay their apportioned price on time, the court shall give notice to the electing cotenants that paid their apportioned price of the interest remaining and the price for all that interest.

(f) Not later than 20 days after the court gives notice pursuant to paragraph (3) of subsection (e) of this Code section, any cotenant that paid their apportioned price of the interest may elect to purchase all of the remaining interest by paying the entire price into the court. After the 20 day period:

(1) If only one cotenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to that cotenant. The court shall issue promptly an order reallocating the interests of all of the cotenants and disburse the amounts held by it to the persons entitled to them;

(2) If no cotenant pays the entire price for the remaining interest, the court shall resolve the partition action under subsections (a) and (b) of Code Section 44-6-186 as if the interests of the cotenants that requested partition by sale were not purchased; or

(3) If more than one cotenant pays the entire price for the remaining interest, the court shall reapportion the remaining interest among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by it to the persons entitled to them, and promptly refund any excess payment held by the court.

(g) Not later than 45 days after the court sends notice to the parties pursuant to subsection (a) of this Code section, any cotenant entitled to buy an interest under this Code section may request the court to authorize the sale as part of the pending action of the interests of cotenants named as defendants and served with the writ or application for partition but that did not appear in the action.

(h) If the court receives a timely request under subsection (g) of this Code section, the court, after hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(1) A sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under subsections

(a) through (f) of this Code section have been paid into court and those interests have been reallocated among the cotenants as provided in those subsections; and

(2) The purchase price for the interest of a nonappearing cotenant shall be based on the court's determination of the fair market value of the heirs property under Code Section 44-6-184 or the evaluation of the property agreed to by all cotenants. (Code 1981, § 44-6-185, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

44-6-186. Partitions in kind.

(a)(1) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to Code Section 44-6-185, or if after conclusion of the buyout under Code Section 44-6-185, a cotenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in Code Section 44-6-187, finds that partition in kind will result in manifest prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

(2)(A) In determining under paragraph (1) of this subsection whether partition in kind would result in manifest prejudice to the cotenants as a group, the court shall consider the following:

(i) Whether the heirs property practicably can be divided among the cotenants;

(ii) Whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court ordered sale likely would occur;

(iii) Evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;

(iv) A cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;

(v) The lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;

(vi) The degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and

(vii) Any other relevant factor.

(B) The court shall not consider any one factor listed in subparagraph (A) of this paragraph to be dispositive without weighing the totality of all relevant factors and circumstances.

(b) If the court does not order partition in kind under subsection (a) of this Code section, the court shall order partition by sale pursuant to Code Section 44-6-187 or, if no cotenant requested partition by sale, the court shall dismiss the action.

(c) If the court orders partition in kind pursuant to subsection (a) of this Code section, the court may require that one or more cotenants pay one or more other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(d) If the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable, or the subject of a default judgment, if their interests were not bought out pursuant to Code Section 44-6-185, a part of the property representing the combined interests of these cotenants as determined by the court, and this portion of the property shall remain undivided. (Code 1981, § 44-6-186, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, a second division (a)(2)(A)(iv), as enacted, was redesignated as division (a)(2)(A)(vi).

44-6-187. Open market sales; brokers and commissions; sealed bids or public sale.

(a) If the court orders an open-market sale of heirs property, the sale shall be an open-market sale unless the court finds that a sale by sealed bids or a public sale would be more economically advantageous and in the best interest of the cotenants as a group.

(b) If the court orders an open-market sale and the parties, not later than ten days after the entry of the order, agree on a broker to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties cannot agree on a broker, the court shall appoint a disinterested broker to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no

lower than the fair market value determined by the court under Code Section 44-6-184 or the valuation of the property agreed upon by the cotenants and on the terms and conditions established by the court.

(c) If the broker appointed under subsection (b) of this Code section obtains within a reasonable time an offer to purchase the property for at least the fair market value determined by the court under Code Section 44-6-184 or the valuation of the property agreed upon by the cotenants:

(1) The broker shall comply with the reporting requirements in Code Section 44-6-188; and

(2) The sale may be completed in accordance with state law other than this subpart.

(d) If the broker appointed under subsection (b) of this Code section cannot obtain within a reasonable time an offer to purchase the property for at least the fair market value determined by the court under Code Section 44-6-184 or the valuation of the property agreed upon by the cotenants, the court, after hearing, shall:

(1) Approve the highest outstanding offer, if any;

(2) Redetermine the value of the property and order that the property continue to be offered for an additional time; or

(3) Order that the property be sold by sealed bids or at a public sale.

(e) If the court orders a sale by sealed bids or a public sale, the court shall set terms and conditions of the sale. If the court orders a public sale, the public sale shall be conducted as a public sale in accordance with Code section 44-6-167.

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser shall be entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds. (Code 1981, § 44-6-187, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

44-6-188. Obligation of brokers to court; reporting requirements.

(a) A broker appointed under subsection (b) of Code Section 44-6-187 to offer heirs property for open-market sale shall file a report with the court not later than seven days after receiving an offer to purchase the property for at least the value determined under Code Section 44-6-184 or 44-6-187.

(b) The report required by subsection (a) of this Code section shall contain the following information:

(1) A description of the property to be sold to each buyer;

(2) The name of each buyer;

(3) The proposed purchase price;

(4) The terms and conditions of the proposed sale, including the terms of any owner financing;

(5) The amounts to be paid to lienholders;

(6) A statement of contractual or other arrangements or conditions of the broker's commission; and

(7) Other material facts relevant to the sale. (Code 1981, § 44-6-188, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

44-6-189. Uniformity amongst states.

In applying and construing this subpart, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the "Uniform Partition of Heirs Property Act." (Code 1981, § 44-6-189, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

44-6-189.1. Construction with federal Electronic Signatures in Global and National Commerce Act.

This subpart modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b). (Code 1981, § 44-6-189.1, enacted by Ga. L. 2012, p. 97, § 2/HB 744.)

ARTICLE 8

JOINT TENANCY WITH SURVIVORSHIP

44-6-190. Creating joint tenancy with survivorship; severance; effect of Code section on other laws.

(a)(1) Deeds and other instruments of title, including any instrument in which one person conveys to himself or herself and one or more other persons, any instrument in which two or more persons convey to themselves or to themselves and another or others, and wills, taking effect after January 1, 1977, may create a joint interest with survivorship in two or more persons.

(2) Any instrument of title in favor of two or more persons shall be construed to create interests in common without survivorship between or among the owners unless the instrument expressly refers to the takers as "joint tenants," "joint tenants and not as tenants in common," or "joint tenants with survivorship" or as taking "jointly with survivorship."

(3) Any instrument of title using one of the forms of expression referred to in paragraph (2) of this subsection or language essentially the same as one of these forms of expression shall create a joint tenancy estate or interest that may be severed as to the interest of any owner by the recording of an instrument which results in his or her lifetime transfer of all or a part of his or her interest; provided, however, that, if all persons owning joint tenant interests in a property join in the same recorded lifetime transfer, no severance shall occur.

(4) Unless the joint tenancy with the right of survivorship is otherwise disposed of in a final order of divorce or annulment, if either party to an instrument of title creating a joint tenancy with the right of survivorship files an affidavit in the real property records maintained by the clerk of superior court of the county in which the real property is located averring that the parties have been lawfully divorced or their marriage has been annulled that the party intends to terminate the joint tenancy, identifies the book and page of recordation of the deed creating the joint tenancy and attaches a copy of the final order of divorce or annulment and a legal description of the property, the party's interests shall be converted into tenants in common.

(b) Neither this Code section nor Code Section 44-6-120 shall:

(1) Be construed to repeal, modify, or limit in any way:

(A) Code Section 14-5-8; or

(B) Article 8 of Chapter 1 of Title 7 or any other law relative to multiple-party accounts in financial institutions; or

(2) Apply to any document, transaction, or right to which Code Section 14-5-8 applies or to multiple-party deposit accounts in any financial institution. (Laws 1828, Cobb's 1851 Digest, p. 545; Ga. L. 1853-54, p. 70, § 1; Code 1863, § 2281; Code 1868, § 2274; Code 1873, § 2300; Code 1882, § 2300; Civil Code 1895, § 3142; Civil Code 1910, § 3722; Code 1933, § 85-1002; Ga. L. 1976, p. 1388, § 10; Ga. L. 1976, p. 1438, § 2; Ga. L. 1980, p. 753, § 2; Ga. L. 1984, p. 1335, § 2; Ga. L. 1985, p. 149, § 44; Ga. L. 2015, p. 827, § 1/HB 99.)

The 2015 amendment, effective July 1, 2015, rewrote this Code section.

Law reviews. — For annual survey on real property, see 64 Mercer L. Rev. 255 (2012).

JUDICIAL DECISIONS

Statute inapplicable when deed not conveying interest to two or more persons. — Deed conveyed a life estate to a widow and a decedent as tenants in common in compliance with O.C.G.A. § 44-6-190, but the deed conveyed the estate in remainder to only one person, either the widow or the decedent, whoever survived the other, and because the deed did not convey that interest in the property to two or more persons, § 44-6-190 did not apply. Greene v. Greene, 311 Ga. App. 132, 714 S.E.2d 650 (2011).

ARTICLE 9

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

44-6-200. Short title.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Cartersville Ranch, LLC v. Dellinger, 295 Ga. 195, 758 S.E.2d 781 (2014).

44-6-204. Exceptions to applicability of article.

JUDICIAL DECISIONS

Cited in Cartersville Ranch, LLC v. Dellinger, 295 Ga. 195, 758 S.E.2d 781 (2014).

44-6-205. Applicability of article; court reform of nonvested dispositions created before article became effective.

JUDICIAL DECISIONS

Cited in Cartersville Ranch, LLC v. Dellinger, 295 Ga. 195, 758 S.E.2d 781 (2014).

44-6-206. Application and construction of article.

JUDICIAL DECISIONS

Cited in Cartersville Ranch, LLC v. Dellinger, 295 Ga. 195, 758 S.E.2d 781 (2014).

CHAPTER 7

LANDLORD AND TENANT

Article 3
Dispossessory Proceedings

ARTICLE 1

IN GENERAL

44-7-1. Creation of landlord and tenant relationship; rights of tenant; construction of lease for less than five years.

JUDICIAL DECISIONS

ANALYSIS

Existence of Relationship

Tenancy at will for trust beneficiary. — Jury issues remained as to whether a trust beneficiary, who had been allowed to stay at the trust's ranch periodically without having to pay rent and without a formal lease agreement, was a tenant at will of the trust and whether, as a result, the trustees were liable for not following the dispossessory procedures of O.C.G.A. § 44-7-1(a) in removing the beneficiary and the beneficiary's property. Kahn v. Britt, 330 Ga. App. 377, 765 S.E.2d 446 (2014).

Creation of Relationship

Oral agreement and no rent sufficient to create relationship. — In a trust beneficiary's action for wrongful eviction from trust property against the trustee, the trial court erred in finding there was no landlord-tenant relationship between the trust and the beneficiary as no rent was paid and there was no lease because all that was required was an oral agreement for use of the premises. Kahn v. Britt, No. A14A1017, 2014 Ga. App. LEXIS 767 (Nov. 17, 2014).

44-7-6. Tenancy at will — Creation when no time period specified.

JUDICIAL DECISIONS

Creation of tenancy at will.

Creditor won relief from the automatic stay per 11 U.S.C. § 362 to pursue any rights that the creditor had under Georgia law such as those provided in O.C.G.A. §§ 44-7-6 and 44-7-7 under which the creditor was entitled to terminate a tenancy at will with sixty days' notice. If, as the debtor argued, the creditor's acceptance of "rent" created a tenancy at will under state law, the existence of a state law right to terminate that tenancy constituted "cause" for relief from stay. In re Nittolo, No. 11-14070-WHD, 2012 Bankr. LEXIS 2410 (Bankr. N.D. Ga. Mar. 16, 2012).

44-7-7. Tenancy at will — Notice required for termination.

JUDICIAL DECISIONS

Acceptance of rent from tenant holding over.

Creditor won relief from the automatic stay per 11 U.S.C. § 362 to pursue any rights that the creditor had under Georgia law such as those provided in O.C.G.A. §§ 44-7-6 and 44-7-7 under which the creditor was entitled to terminate a tenancy at will with sixty days' notice. If, as the debtor argued, the creditor's acceptance of "rent" created a tenancy at will under state law, the existence of a state law right to terminate that tenancy constituted "cause" for relief from stay. In re Nittolo, No. 11-14070-WHD, 2012 Bankr. LEXIS 2410 (Bankr. N.D. Ga. Mar. 16, 2012).

44-7-14. Tort liability of landlord.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Owner had relinquished control.

Trial court did not err in granting landlord summary judgment in a patron's action to recover damages for injuries the patron sustained in a restaurant owner's parking lot on the ground that the landlord had fully parted with possession of the leased property and could not be held liable for the patron's injuries pursuant to O.C.G.A. § 44-7-14 because the evidence the patron offered was insufficient to create an issue of fact as to whether the landlord was an out-of-possession landlord; the owner had exclusive control of the parking lot where the patron's injury occurred, and there was no evidence that the landlord contractually undertook to remain in possession of any common areas on the property, let alone over the parking lot where the patron's injury occurred. Lake v. APH Enters., LLC, 306 Ga. App.

General Consideration (Cont'd)

317, 702 S.E.2d 654 (2010).

Duties of Landlord

1. In General

Liability of landlord to third persons. — Landlord's liability to a third person who is injured on property which was relinquished by rental or under a lease is determined by O.C.G.A. § 44-7-14. Younger v. Dunagan, 318 Ga. App. 554, 733 S.E.2d 81 (2012).

2. Knowledge or Notice

Landlord had no actual or constructive knowledge of defect.

Condominium unit owner was not liable for a neighbor's claims of negligence and nuisance, when the owner's hot water heater ruptured and flooded the neighbor's unit, because the owner did not know that the water heater was defective and, as an out-of-possession landlord who rented the condominium unit to another party that occupied the unit, the owner had no duty to maintain the hot water heater under O.C.G.A. § 44-7-14. Karle v. Belle, 310 Ga. App. 115, 712 S.E.2d 96 (2011).

Trial court erred by denying a building owner's motion for summary judgment under O.C.G.A. § 44-7-14 in an employee's action to recover damages for injuries the employee sustained when the door to a handicap bathroom stall the employee used at work fell off of the door's hinges because there were no facts demonstrating that the owner should have discovered and repaired the hinge on the bathroom stall door before the employee's injury; the owner received no complaints about bathroom stall hinges before the employee's injury and discovered no problems with other bathroom stall hinges afterward. Watts & Colwell Builders, Inc. v. Martin, 313 Ga. App. 1, 720 S.E.2d 329 (2011).

Under O.C.G.A. § 44-7-14, an absentee landlord was not liable for a failure to repair a latent defect unless the landlord had knowledge of the defect and the consequent necessity for repairs. Because the landlords testified that the landlords were unaware of any abnormality regarding the height of the top stair in their home or that the landlord violated any building code, the landlord disproved the knowledge element of the tenant's claims and were entitled to summary judgment. Martin v. Hansen, 326 Ga. App. 91, 755 S.E.2d 892 (2014).

4. Miscellaneous Consideration

Liability of landlord for dog bite.

Trial court properly awarded a landlord summary judgment in a postal worker's personal injury suit alleging injuries from a dog owned by a tenant because the landlord was entitled to the protection of O.C.G.A. § 44-7-14 since it was the tenant's dog and the landlord had no right of possession to the premises under the lease; thus, the landlord had no liability to third persons for the negligence of the tenant. Younger v. Dunagan, 318 Ga. App. 554, 733 S.E.2d 81 (2012).

Assault of club patron in parking lot. — Owners of property, in the onwers' capacity as a landlord, when a club patron was assaulted in the parking lot by an unruly patron who had been physically removed from the club were not liable under a negligence theory as the landlord's right to inspect the premises was not equivalent to the right to possess the premises; rather, the landlord had parted with possession of the leased premises. Boone v. Udoto, 323 Ga. App. 482, 747 S.E.2d 76 (2013).

ARTICLE 3

DISPOSSESSORY PROCEEDINGS

44-7-50. Demand for possession; procedure upon a tenant's refusal; concurrent issuance of federal lease termination notice.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Jurisdiction.

In a case in which: (1) a lender foreclosed on real property; (2) the lender filed a dispossessory warrant in state court pursuant to O.C.G.A. § 44-7-50; (3) a resident of the property petitioned for removal to federal court; and (4) the lender filed an emergency motion to remand the case back to state court, the district court lacked federal question jurisdiction. No federal law or authority was invoked on the face of the dispossessory warrant; thus, the dispossessory claim that formed the basis of the action was exclusively a matter of state law even though the resident argued that Georgia's dispossessory process violated the resident's rights under the U.S. Constitution. Further, jurisdiction did not exist based on diversity as the resident failed to establish that the parties were diverse and that the amount in controversy, as viewed from the lender's perspective, had been met; the lender's claim seeking only ejectment in a dispossessory action could not be reduced to a monetary sum for purposes of determining the amount in controversy. Citimortgage, Inc. v. Dhinoja, No. 1:10-cv-816-TCB, 2010 U.S. Dist. LEXIS 45085 (N.D. Ga. Apr. 13, 2010).

Because a tenant's petition to remove under 28 U.S.C. § 1446 was untimely, the trial court retained jurisdiction of the dispossessory proceeding; the tenant was served with the dispossessory affidavit and summons but the tenant did not file the tenant's motion for petition for removal until more than 30 days later. Lingo v. Smith, 316 Ga. App. 164, 729 S.E.2d 18 (2012).

No independent legal duty imposed upon third party contractors. — Bank, which was the legal title holder of the foreclosed property, had the duty to comply with the statutory dispossessory procedures imposed upon the bank and could not be delegated to a third party hired by the bank to ensure the condition of the foreclosed home. Furthermore, there was no evidence that the bank ever sought to accomplish the bank's statutory duties through an agent by contracting with the third party to file a dispossessory action against the plaintiffs, the former property owners, on the bank's behalf. It follows that as undisputed independent contractors the third parties had no separate legal duty to file a dispossessory action and then comply with the statutory procedures applicable in such an action; thus, the plaintiffs could not succeed on wrongful eviction and trespass claims. Ikomoni v. Exec. Asset Mgmt., LLC, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

Defenses

Foreclosure sale cannot be asserted as a defense in dispossessory proceeding. — Tenant could not assert errors related to a foreclosure sale because challenges to a foreclosure sale could not be asserted as a defense in a subsequent dispossessory proceeding. Lingo v. Smith,

Defenses (Cont'd)

316 Ga. App. 164, 729 S.E.2d 18 (2012).

Procedural Matters

Failure to grant tenant trial. — Trial court erred in granting a writ of possession to the owner because, inter alia, the trial court failed to follow the procedures required for a dispossessory action. The trial court did not adhere to the requirements of the dispossessory statute as the tenant was entitled to, but was not granted, a trial on the issues, which would have included taking the testimony of witnesses orally in open court and proper notice of a trial. Metro Atlanta Task Force for the Homeless, Inc. v. Premium Funding Solutions, LLC, 321 Ga. App. 100, 741 S.E.2d 225 (2013).

Miscellaneous Considerations

Fixtures attached to realty.

When an arrestee refused to allow a guest back into the arrestee's home and removed the guest's things, officers were not entitled to qualified immunity as to the arrestee's civil rights claims because the officers did not show that the officers had probable cause to arrest the arrestee for criminal damage to property under O.C.G.A. § 16-7-23; the parties' arguments regarding the exclusive method that a landlord may use to evict a tenant under O.C.G.A. § 44-7-50 et seq. were irrelevant. Gray v. City of Roswell, No. 12-10817, 2012 U.S. App. LEXIS 16852 (11th Cir. Aug. 13, 2012) (Unpublished).

44-7-51. Issuance of summons; service; time for answer; defenses and counterclaims.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Removal to federal court proper. — Even though Georgia courts have held that dispossessory actions were not civil actions, a dispossessory action filed by the Federal Home Loan Mortgage Corporation was properly removed to federal court under a Weems analysis since: (1) dispossessory actions were tried before a magistrate court, which was a regular judicial tribunal; (2) dispossessory actions required notice and service under O.C.G.A. § 44-7-51; (3) a dispossessory action was comparable to a civil trial if the tenant answered; and (4) rent was an issue of pecuniary value in a dispossessory action. Fed. Home Loan Mortg. Corp. v. Matassino, 911 F. Supp. 2d 1276 (N.D. Ga. Dec. 3, 2012).

44-7-52. When tender of payment by tenant serves as complete defense.

JUDICIAL DECISIONS

Rent means money.

Even though Georgia courts have held that dispossessory actions were not civil actions, a dispossessory action filed by the Federal Home Loan Mortgage Corporation was properly removed to federal court under a Weems analysis since: (1) dispossessory actions were tried before a magistrate court, which was a regular judicial tribunal and required notice and service; (2) a dispossessory action was comparable to a civil trial if the tenant answered under O.C.G.A. § 44-7-53(b): and (3) rent was an issue of pecuniary value in a dispossessory action under O.C.G.A. §§ 44-7-52(a), 44-7-53(b), and

44-7-54. Fed. Home Loan Mortg. Corp. v. Matassino, 911 F. Supp. 2d 1276 (N.D. Ga. Dec. 3, 2012).

44-7-53. When writ of possession issued; trial of issues; possession pending trial.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Removal to federal court. — Even though Georgia courts have held that dispossessory actions were not civil actions, a dispossessory action filed by the Federal Home Loan Mortgage Corporation was properly removed to federal court under a Weems analysis since: (1) dispossessory actions were tried before a magistrate court, which was a regular judicial tribunal and required notice and service; (2) a dispossessory action was comparable to a civil trial if the tenant answered under O.C.G.A. § 44-7-53(b): and (3) rent was an issue of pecuniary value in a dispossessory action under O.C.G.A. §§ 44-7-52(a), 44-7-53(b), and 44-7-54. Fed. Home Loan Mortg. Corp. v. Matassino, 911 F. Supp. 2d 1276 (N.D. Ga. Dec. 3, 2012).

44-7-54. Payment of rent and utility payments into court; issuance of writ upon failure to pay; disposition of funds.

JUDICIAL DECISIONS

Removal to federal court. — Even though Georgia courts have held that dispossessory actions were not civil actions, a dispossessory action filed by the Federal Home Loan Mortgage Corporation was properly removed to federal court under a Weems analysis since: (1) dispossessory actions were tried before a magistrate court, which was a regular judicial tribunal and required notice and service; (2) a dispossessory action was comparable to a civil trial if the tenant answered under O.C.G.A. § 44-7-53(b): and (3) rent was an issue of pecuniary value in a dispossessory action under O.C.G.A. §§ 44-7-52(a), 44-7-53(b), and 44-7-54. Fed. Home Loan Mortg. Corp. v. Matassino, 911 F. Supp. 2d 1276 (N.D. Ga. Dec. 3, 2012).

Tenant in possession pending litigation.

Under O.C.G.A. § 9-11-60(h), the law of the case had been abolished and did not bind the trial court to the court's interim ruling ordering the wife of a mortgagor to pay rent into the registry of the court pursuant to O.C.G.A. § 44-7-54(a)(1) during a continuance of the lender's dispossessory action. Harper v. JP Morgan Chase Bank Nat'l Ass'n, 305 Ga. App. 536, 699 S.E.2d 854 (2010).

Lessee estopped from denying existence of valid contract. — Defendant lessee was estopped, given the lessee's prior representations, from denying the existence of a valid contract with the plaintiff lessor and that the rent money the lessee paid into the court's registry was a matter of controversy for purposes of O.C.G.A. § 44-7-54(c). The lessee's obligation to pay rent existed wholly apart from any right to damages arising from the lessor's alleged breach. McDonald Georgia Commerce Ctr. 400, LLC v. F & C Logistics, Inc., No. 4:12-cv-299, 2013 U.S. Dist. LEXIS 22917 (S.D. Ga. Feb. 19, 2013).

No payment to landlord of sums received. — Court declined to order payment to a landlord of any of the sums

received from the defendants, a tenant and the tenant's parent company, under O.C.G.A. § 44-7-54(c), because all of the sums the landlord requested were in controversy because the defendants asserted counterclaims for breach of contract and fraud against the landlord for allegedly failing to deliver on promises of railroad access for the property in question and, as a result of the alleged breach, the defendants denied that the defendants owed the landlord rent for two months. McDonald Ga. Commerce Ctr. 400, LLC v. F & C Logistics, Inc., No. 4:12-cv-299, 2013 U.S. Dist. LEXIS 348 (S.D. Ga. Jan. 2, 2013).

Payment to court required. — O.C.G.A. § 44-7-54(a) required the defendants, a tenant and the tenant's parent company, to pay to the court all rent and utility payments payable to the landlord under terms of the lease allegedly owed prior to the issuance of the dispossessory warrant because more than two weeks had passed since the date of service, and the court had not decided yet the right of possession issue. McDonald Ga. Commerce Ctr. 400, LLC v. F & C Logistics, Inc., No. 4:12-cv-299, 2013 U.S. Dist. LEXIS 348 (S.D. Ga. Jan. 2, 2013).

44-7-55. Judgment; writ of possession; landlord's liability for wrongful conduct; distribution of funds paid into court; personal property.

JUDICIAL DECISIONS

No independent legal duty imposed upon independent contractors. — Trial court correctly granted limited liability companies (LLC) summary judgment on the mortgagors' wrongful eviction and trespass claims given the absence of an independent legal duty imposed upon the companies; because a mortgagee was the legal title holder of foreclosed property, the duty to comply with the statutory dispossessory procedures provided in O.C.G.A. § 44-7-50 et seq. was imposed upon the mortgagee and could not be delegated to a third party, and since there was no evidence that the mortgagee ever sought to accomplish the mortgagee's statutory duties through an agent by contracting with either company to file a dispossessory action against the mortgagors on the mortgagee's behalf. The independent contractors had no separate legal duty to file a dispossessory action and then comply with the statutory procedures. Ikomoni v. Exec. Asset Mgmt., LLC, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

44-7-59. Removal of transportable housing from lands subject to writ of possession.

If the court issues a writ of possession to property upon which the tenant has placed a manufactured home, mobile home, trailer, or other type of transportable housing and the tenant does not move the same within ten days after a final order is entered, the landlord shall be entitled to have such transportable housing moved from the property at the expense of the tenant by a motor common carrier licensed by the Department of Public Safety for the transportation of manufactured housing. There shall be a lien upon such transportable housing to the extent of moving fees and storage expenses in favor of the person performing such services. Such lien may be claimed and foreclosed in the same manner as special liens on personalty by mechanics under Code Sections 44-14-363 and 44-14-550, except that storage fees not to

exceed $4.00 per day shall be expressly allowed. (Code 1981, § 44-7-59, enacted by Ga. L. 1987, p. 842, § 1; Ga. L. 2012, p. 580, § 13/HB 865.)

The 2012 amendment, effective July 1, 2012, substituted "Department of Public Safety" for "Public Service Commission" near the end of the first sentence.